SELECTED GUIDELINE APPLICATION DECISIONS FOR THE FIFTH CIRCUIT

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U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS—FIFTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part B General Application Principles

United States v. Miro, 29 F.3d 194 (5th Cir. 1994). The district court did not err when it applied the guidelines only to conduct that occurred after November 1, 1987. The defendant pled guilty to several mail fraud counts, some of which were based on conduct that occurred before the effective date of the guidelines. The defendant asserted that the guidelines applied to all of the mail fraud counts because his criminal activity constituted a continuing offense. The circuit court disagreed. "Just because criminal activity takes place over a period of time does not mean it is a continuing or `straddle' offense." *Id*. at 198. Even though the defendant's mail fraud was a continuing course of conduct, each mailing was a separate completed offense. The district court was correct in ordering that the sentence for the preguidelines counts be consecutive to the sentence for the guideline counts.

§1B1.3 Relevant Conduct

United States v. Hammond, 201 F.3d 346 (5th Cir. 1999). The defendant was convicted of numerous charges relating to his embezzlement of union funds. On appeal, he challenged the district court's finding that the total loss attributed to him incorrectly included $41,712 embezzled by third parties. The appellate court noted that (1) under §2B1.1(b), the base offense level for embezzlement is based upon the loss amount caused by the embezzlement; (2) §1B1.3 provides that, in determining this loss amount, a defendant is responsible for loss resulting from his own conduct as well as from his "relevant conduct;" and (3), under §1B1.3(a)(1)(B), "relevant conduct" includes all reasonable foreseeable actions taken by others in furtherance of jointly undertaken criminal activity. The appellate court concluded that the district court must make a specific finding that a defendant was engaged in jointly undertaken criminal activity with the third parties. Furthermore, the district court did not indicate that, assuming that the defendant was engaged in these activities, the actions of the third parties in the embezzlement of funds were reasonably foreseeable. Thus, the appellate court vacated the sentence and remanded with instructions for further findings.

United States v. Levario-Quiroz, 161 F.3d 903 (5th Cir. 1998). In a matter of first impression in the Fifth Circuit, the court of appeals held that a defendant's offenses in Mexico did not fall within the sentencing guidelines' definition of "relevant conduct" for purposes of determining the sentencing range and imposing sentences for his domestic convictions. The defendant did not commit the offenses in Mexico during the commission of the domestic crimes for which he was convicted, and although his foreign offenses were part of the same course of conduct as those crimes, they were not offenses of a character for which another guidelines section would require grouping of multiple counts. However, the court of appeals went on to hold that the district court could have imposed a sentence outside the range established by the sentencing guidelines,

given that the aggravating circumstances were not literally or adequately taken into consideration by the guidelines. The defendant had murdered a man in Mexico, took flight, and shot at pursuing Mexican law officers with a deadly firearm, immediately prior to and for the purpose of bringing himself and his weapon illegally into the United States. The defendant's circumstances differed significantly from the "heartland" cases.

United States v. Roberts, 203 F.3d 867 (5th Cir.), *cert. denied*, 530 U.S. 1238 (2000). The district court correctly applied a seven-level increase under §2B3.1 for discharge of a firearm when the gun was fired by a police officer. A deputy fired two shots during a struggle over his gun with the defendant and a codefendant, whom he was trying to arrest for poaching. The defendants fled with the weapon. One of the defendants was convicted under 18 U.S.C. § 922(g), possession of a firearm by a felon. The court applied the cross reference in §2K2.1(c) to sentence the defendant under §2B3.1, the robbery guideline. Under §1B1.3, the seven-level enhancement for discharge of a firearm can be applied if a non-participant discharges a firearm. Subsection (a)(1)(A) requires that a defendant be responsible for "all acts and omissions . . . induced or willfully caused . . ." The defendant "unquestionably induced and willfully caused" the deputy to fire the gun. *Id*. at 870.

See United States v. Rosogie, 21 F.3d 632 (5th Cir. 1994), §4A1.3, p. 20.

United States v. Schorovsky, 202 F.3d 727 (5th Cir. 2000). Conduct of conspirators after a defendant withdraws from a conspiracy is excluded from the defendant's relevant conduct. The district court erred in including as relevant conduct the quantity of drugs trafficked after defendant effectively withdrew from the conspiracy.

United States v. Wall, 180 F.3d 641 (5th Cir. 1999). Incidents in 1996 and 1997 involving seizure of marijuana from defendant's former girlfriend could not be considered relevant conduct because they were not "part of a common scheme or plan" of the instant 1992 marijuana offense. Two offenses do not constitute a single course of conduct simply because they both involve drug distribution. The "temporal proximity" between the 1996 and 1997 offenses and the instant offense is lacking; the offenses did not involve the same drug supplier or destination; and the modus operandi of the later offenses differs from the instant offense.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

United States v. Domino, 62 F.3d 716 (5th Cir. 1995). The district court violated the ex post facto clause in sentencing the defendant under the 1993 version of the Sentencing Guidelines. The defendant pled guilty to unlawful use of a telephone to facilitate the possession of a listed chemical with intent to manufacture a controlled substance in violation of 21 U.S.C. § 843(b) in 1990. In determining the defendant's base offense level, the probation officer determined that the defendant's guilty plea contained a stipulation that established the more serious offense of possession under 21 U S.C. § 841(d)(1) and calculated a base offense level of 32, instead of 12 under the 1989 version of the guidelines. The defendant objected to this determination and insisted that he did not stipulate that he actually possessed the phenylacetic acid at issue, only that he used the telephone to facilitate possession. The defendant failed to appear for sentencing and was not sentenced until 1994. Prior to the defendant's sentencing in 1994, the

presentence report was updated to incorporate the 1993 version of the sentencing guidelines resulting in a base offense level of 28. The defendant was sentenced to 48 months on each count to run consecutively for a maximum of 96 months with a term of supervised release of one year on each count to run concurrently. The defendant argued on appeal that his sentence violated the ex post facto clause because, calculated correctly, it would be more lenient under the 1989 version of the guidelines. The circuit court determined that the stipulated facts did not specifically establish that the defendant possessed phenylacetic acid with intent to manufacture a controlled substance in violation of 21 U.S.C. § 841(d)(1), and remanded the case directing the district court to sentence the defendant pursuant to the 1989 version of the guidelines.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against the Person

§2A2.2 Aggravated Assault

United States v. Price, 149 F.3d 352 (5th Cir. 1998). The district court correctly applied the six-level enhancement for "permanent or life-threatening bodily injury" rather than the four-level enhancement for "serious bodily injury" where damage to the victim's hand was permanent and had resulted in a 15 to 25 percent loss of function. The court of appeals rejected the defendant's claim that the six-level enhancement should be reserved for the most serious injuries: the plain language of Application Note 1(h) to §1B1.1 encompasses injuries that may not be terribly severe but are permanent. The enhancement punishes not just the severity of the injury, but its duration.

§2A3.1 Criminal Sexual Abuse; Attempt to Commit Criminal Sexual Abuse

United States v. Garcia-Lopez, 234 F.3d 217 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1389 (2001). The district court did not err in sentencing the defendant under the guideline for sex with a minor (§2A3.2) and its cross-reference to §2A3.1, rather than the guideline for criminal sexual abuse (§2A3.1) based on the minor victim's testimony that the defendant raped her. On appeal the defendant argued that the district court erred in applying §2A3.1, through the cross-reference under §2A3.2(c)(1), in determining the proper base offense level for the count of conviction because he was not convicted of forcible rape and because the alleged rape occurred in a foreign country. The Fifth Circuit disagreed and held that the defendant did not point to any case that a conviction of forcible rape and the commission of such rape within the United States are requisites for the application of the cross-reference.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

United States v. Bullard, 13 F.3d 154 (5th Cir.), *rev'd on other grounds*, 37 F.3d 160 (1994). The defendant pled guilty to knowing and willful misapplication of bank funds. He challenged his sentence on two bases. First, he argued that the district court's calculation of the loss sustained by the bank under §2B1.1 was excessive because it did not account for certain offsets reported by the bank. The circuit court upheld the loss amount calculated by the district court, finding that the defendant's failure to specify an alternative loss calculation supported by reliable evidence at the time of sentencing constituted a waiver. Furthermore, the district court's decision to accept loss presented in the PSR did not amount to a "plain error" or a "gross miscarriage of justice" such that the defendant may overcome this waiver. Second, despite the absence of any objection at sentencing, the defendant argued that he is entitled to a three-level reduction of sentence available under the 1992 amended version of §3E1.1(b)(1), (2), rather than the two-level reduction the district court granted pursuant to 1989 version listed in the PSR. The circuit court upheld the sentence because the record demonstrated that a two-level, as opposed to a three-level, downward adjustment did not result in a miscarriage of justice as it would not have affected the total offense level.

§2B3.1 Robbery

United States v. Ashburn, 20 F.3d 1336 (5th Cir.), *reinstated in part on reh'g en banc*, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). The district court did not err in enhancing the defendant's offense level under §2B3.1, despite the fact that the "express threat of death" was made to bystanders, rather than to the victim, and occurred during the escape phase of the robbery.

United States v. Franks, 230 F.3d 811 (5th Cir. 2000). The district court erred in applying the two-level enhancement for an express threat of death under §2B3.1(b)(2)(F) because it resulted in "double counting" for the use of a firearm during the commission of a robbery under §2K2.4 and also for threatening the victim of the robbery with the firearm under §2B3.1. The defendant filed a § 2255 motion challenging the district court's two-level enhancement to his sentence under §2B3.1(b)(2)(F) for an express threat of death but the motion was dismissed. On appeal, the defendant argued that the threat of death related to the use of the firearm was covered under Application Note 2 of §2K2.4[1] so that the district court was precluded from enhancing his sentence on this ground. The court held that it was clear from the trial testimony that the threat of death the defendant made was plainly related to the use of the firearm and that the district court erred in enhancing the defendant's sentence under §2B3.1(b)(2)(F).

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[1] It should be noted that effective November 1, 2000, Application Note 2, §2K2.4 was amended as referenced in Appendix C, Amendment 599. The amendment no longer references in Application Note 2 the "*e.g.*, clause" referred to in the Franks decision, which previously stated "(*e.g.*, §2B3.1(b)(2)(A)-(F) (Robbery), is not to be applied in respect to the guideline for the underlying offense.)"

United States v. Hickman, 151 F.3d 446 (5th Cir.1998). The district court erred in concluding that the defendant "physically restrained" his victim when he tapped him on the shoulder with a gun. The court of appeals held that, while a defendant may physically restrain a victim without actually tying, locking, or binding him up, the defendant did nothing to restrain his victim that an armed robber would not normally do. The court agreed with the Seventh Circuit in noting that merely brandishing a weapon cannot support the enhancement because then the enhancement would be warranted every time an armed robber entered a bank. *See* United States v. Doubet, 969 F.2d 341 (7th Cir. 1992). The district court did not err in enhancing the defendant's offense level for abducting his victims. The district court found that defendant initially accosted certain victims in the parking lot and then forced them back into the restaurant. The court of appeals held that it is not necessary to cross a property line or the threshold of a building to establish a change of location.

Part C Offenses Involving Public Officials

§2C1.1 Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right

United States v. Snell, 152 F.3d 345 (5th Cir. 1998). A juror qualifies as a "government official" in a "high-level, decision-making or sensitive position" within the meaning of §2C1.1(b)(2)(B). The defendant pled guilty to a charge of bribery under 18 U.S.C. § 201(b)(2)(A) for taking a bribe from criminal defendants on whose jury he sat as a foreman. The sentencing court enhanced the defendant's sentence by eight levels under §2C1.1(b)(2)(A). The Fifth Circuit affirmed the enhancement holding that jurors occupy a central position in the criminal justice system that is at least equivalent to that of the other public service officers, such as judges and prosecutors, explicitly mentioned in the application note.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

United States v. Allison, 63 F.3d 350 (5th Cir.), *cert. denied*, 516 U.S. 955 (1995). The circuit court held that the district court could properly sentence the defendant based on the size and capability of the methamphetamine laboratory. The defendant argued that under Amendment 484, he could only be sentenced on the basis of the methamphetamine in his possession at the time of his arrest, and therefore his original sentence must be reduced. The circuit court noted that Amendment 484 does not speak to the situation in which the district court is sentencing the defendant based on the size and capability of the laboratory involved; instead, the amendment instructs the district court that the full weight of mixtures cannot be attributed to the defendant as the amount seized. The circuit court stated that if the district court is sentencing the defendant based on the size and capability of the laboratory, it is the size and production capacity of the laboratory, not the actual amount of methamphetamine seized, that is the touchstone for sentencing purposes. The district court properly sentenced the defendant on this ground.

United States v. Leonard, 157 F.3d 343 (5th Cir. 1998). A drug defendant need not face a mandatory minimum sentence in order to be entitled to a downward sentencing adjustment under §2D1.1(b)(6). The provision, providing for a decrease of two offense levels if the criteria of §5C1.2 ("safety valve") are met, applies on its face, as a "specific offense characteristic," regardless of whether or not the defendant is subject to a mandatory minimum sentence.

United States v. Martinez, 151 F.3d 384 (5th Cir.), *cert. denied*, 525 U.S. 1031 (1998). The defendant argued that the district court violated due process of law by imposing a sentence of life imprisonment based on his offense conduct when only about 40 kilograms of marijuana was actually seized by government authorities. The court of appeals rejected this argument, noting that a defendant convicted in a drug trafficking offense is responsible for the quantity reasonably foreseeable to him, regardless of what quantity was actually seized or was alleged in the indictment. A penalty based on conduct that was an element of the offense of conviction cannot violate a defendant's due process rights.

United States v. Pardue, 36 F.3d 429 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). The defendant moved to recalculate his sentence pursuant to 18 U.S.C. § 3582(c)(2) in light of the amendment to guideline §2D1.1(c) prescribing a new method for calculating the quantity of LSD to be used in determining a guideline sentence. The appellate court joined the First and Tenth Circuits in holding that the mandatory minimum of 21 U.S.C. § 841 "overrides the retroactive application of the new guideline." *See* United States v. Dimeo, 28 F.3d 240 (1st Cir. 1994); United States v. Mueller, 27 F.3d 494, 495-97 (10th Cir. 1994). The issue was one of first impression in the circuit, and the appellate court concluded that a logical reading of the policy statement to §2D1.1(c) recognizes that the new approach to calculating the amount of LSD "does not override the applicability of `mixture or substance' for the purpose of applying any mandatory minimum sentence." *Id*. at 431. The appellate court noted that, in Chapman v. United States, 500 U.S. 453, 460-64 (1991), the Supreme Court interpreted the term "mixture or substance" in 21 U.S.C. § 841 to require the weight of the carrier medium for LSD to be "included for purposes of determining the mandatory minimum sentence." *Id*.

Part F Offenses Involving Fraud and Deceit

§2F1.1 Fraud or Deceit

United States v. Brown, 186 F.3d 661 (5th Cir. 1999). The Fifth Circuit held that an adjustment to restitution does not necessarily affect loss enhancement. Defendant pled guilty to wire fraud which resulted from a fraudulent warranty claim. The district court applied a six-level enhancement because of its determination that the loss was $75,104.18. After the sentencing was completed, the government advised the court that the restitution to the victim insurance companies and individuals was actually lower and it gave the figure of $67,938.72. The district court lowered the restitution amount accordingly. The defendant argued that this moved him out of the $70,000 to $120,000 range and that he should only have received a five-level enhancement for the loss. The Fifth Circuit rejected that argument because adjustments in a restitution figure do not necessarily translate into corresponding decreases in the loss amount. In this case, the Court determined that the defendant's loss amount still exceeded $70,000 because there was no adjustment in the amount defendant owed to General Motors.

United States v. Coscarelli, 105 F.3d 984 (5th Cir. 1997), *opinion vacated on other grounds, partially reinstated*, 149 F.3d 342 (5th Cir. 1998). In an appeal by the government, the appellate court held that the district court erred in applying §2F1.1, the provision for fraud and deceit, in calculating the term of the defendant's sentence. The government maintained that the district court should have used §2S1.1, the money laundering guideline, regardless of that fact that the government did not charge the defendant with a substantive count of money laundering and there was no independent money laundering allegation in the indictment. The appellate court agreed and noted that the defendant pled guilty as charged to the indictment which included Count I of the indictment charging him with violating 18 U.S.C. § 371 by conspiring to commit mail fraud, wire fraud, and money laundering. Because the offenses alleged in the conspiracy are to be grouped under §3D1.2(d), and §3D1.3 requires that the highest offense level of the counts in the group must be applied, the money laundering guideline must be used.

United States v. Godfrey, 25 F.3d 263 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994). The district court did not err in enhancing the defendant's sentence for more than minimal planning under §2F1.1 and for his leadership role pursuant to §3B1.1(a). The defendant challenged the application of the two adjustments as constituting double-counting. The circuit court disagreed. Not all double-counting is impermissible. "Double-counting is impermissible only when the particular guidelines in question forbid it." Since §§3B1.1 and 2F1.1 do not forbid double-counting with each other, adjustments may be made under both sections. *But see* United States v. Romano, 970 F.2d 164, 167 (6th Cir. 1992) (adjustments under both sections impermissible since "being an organizer or leader of more than five persons necessitates more than minimal planning").

United States v. Izydore, 167 F.3d 213 (5th Cir. 1999). A bankruptcy trustee's fees are not to be included in the calculation of the amount of loss from a bankruptcy fraud. Section 2F1.1 defines loss as "the value of the money, property, or services unlawfully taken." Bankruptcy trustees' fees are consequential damages, according to the Fifth Circuit, and the commentary to §2F1.1 makes clear that, as a general rule, consequential losses are not to be included in a loss calculation. Since consequential losses are to be considered in certain circumstances enumerated by the commentary to §2F1.1, the Court said that this evidenced an intent by the Sentencing Commission to omit consequential damages from the general loss definition. In this case, the trustees' fees were incurred after the defendant's criminal conduct was completed and, therefore, should not have been included in the defendant's loss determination.

United States v. McDermot, 102 F.3d 1379 (5th Cir. 1996). The district court erred in refusing to enhance the defendants' sentence four levels under §2F1.1(b)(6) on the basis that the failure of the reinsurer prior to the defendants' fraud rendered the institution insolvent and the enhancement inapplicable. The Court of Appeals rejected the district court's reasoning that once a financial institution becomes insolvent, it has no "safety" or "soundness" which can be jeopardized. This mandatory enhancement applies not only to insolvency, but also to cases in which the defendants' actions substantially reduced benefits to insureds, rendered the institution unable to refund deposits or payments or placed the institution in jeopardy of the same. Fraud upon an already insolvent institution may result in the loss of benefits to insureds or render the institution unable to refund a payment or deposit. Alternatively, the court rejected the reasoning that the enhancement should not be applied because it was not intended to apply to situations in which the defendant established himself as principal stockholder of the financial institution. The

court reasoned that the policy behind the enhancement was the protection of third party interests, which are affected regardless of the financial interests of the defendants.

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in increasing the defendant's base offense level by three levels under §2F1.1(b)(1)(D) based on the finding that the defendant caused losses of over $10,000. The defendant pled guilty to making false statements on immigration documents and education grant applications. The defendant was sentenced to ten months incarceration and was ordered to be deported as a condition of supervised release. The defendant argued on appeal that the court erred in calculating the loss attributable to him because he intended to repay the money. The circuit court ruled that the district court erred in failing to make a finding as to whether the defendant would pay back the loans. The district court erred in calculating loss on the basis of the amount it believed the defendant intended to receive.

United States v. Smithson, 49 F.3d 138 (5th Cir. 1995). The appellate court vacated the defendants' sentences and remanded for the district court to revisit its valuation of loss under §2F1.1. The defendants purchased options to purchase land, and during the option period, would attempt to make zoning changes and other improvements, and then search for buyers for the land. When the defendant Pyron filed a Chapter Seven bankruptcy petition, he failed to reference two options he had owned two days earlier. Rather, prior to filing the petitions, he had his codefendant Smithson, an attorney, create two corporations for the purpose of receiving the options. A jury found the defendants guilty of five counts of bankruptcy fraud. In determining loss, the district court attempted to calculate the defendants' gain. The PSR calculated the total gain to be $278,730.42 by adding the current value of the defendants' shares in one of the corporations, Smithson's legal fees earned in the purchase of a building subject to one of the options, plus expenses Pyron recovered in connection with the sale of other option property. The appellate court noted that what the defendants concealed from the trustee "was an option, not a building." *Id*. at 144.The options were difficult to value at trial, and evidence indicated that the loss to the bankruptcy estate was "for all practical purposes, zero." *Id*. Although Application Note 8 to §2F1.1 provides that gain can be used as alternative valuation method, the gain was also difficult to calculate. The appellate court noted that "[i]t is imperative, however, that the value ascribed to the options cannot be measured after their first post-petition expiration dates. On remand, the district court must decide the value of the TeamBank option based on this standard; this, and only this, is what the appellants gained by concealing the options from the bankruptcy estate." *Id*.

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G1.1 Promoting Prostitution or Prohibited Sexual Conduct

United States v. Rhodes, No. 00-10709, 2001 WL 618551 (5th Cir. June 6, 2001). The district court did not err in applying the cross-reference under §2G1.1 to §2A3.1 and in not permitting the defendant to withdraw his plea. The defendant pled guilty to traveling interstate with the intent to engage in a sexual act with a juvenile, in violation of 18 U.S.C. § 2423(b). The district court applied the cross-reference under §2G1.1 to §2A3.1 in determining the defendant's base offense level because stipulated facts supported defendant actually committed criminal sexual abuse. The defendant was not permitted to withdraw his guilty plea after the court rejected the sentencing guideline provision recommended by the government in the plea agreement. On appeal, the Fifth Circuit held that the district court did not err in its ruling because "[w]here the defendant has pled guilty to violating 18 U.S.C. § 2423(b) but has stipulated to facts which constitute aggravated sexual abuse, in violation of 18 U.S.C. § 2241(c), pursuant to §1B1.2, the defendant may be sentenced for the offense of conviction by application of §2A3.1." 2001 WL 618551, at *5.

Part J Offenses Involving the Administration of Justice

§2J1.7 Commission of Offense While on Release

United States v. Dadi, 235 F.3d 945 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2230 (2001). The district court did not err by not applying the enhancement under 18 U.S.C. § 3147 and §2J1.7 for committing an offense while on release on another charge. On appeal, the court found that notice must be given at the time of the defendant's release from custody in order to be deemed sufficient. The government did not file its notice of intent to enhance the defendant's sentence until more than a month after the presentence report was initially disclosed to counsel, and 19 days after the deadline for filing objections had passed. The court determined that the government could point to nothing in the record to show that the defendant received such notice upon his release and therefore held that the district court's decision not to apply the enhancement under § 3147 and §2J1.7 would stand.

Part K Offenses Involving Public Safety

§2K1.4 Arson; Property Damage By Use of Explosives

United States v. Pazos, 24 F.3d 660 (5th Cir. 1994). The district court did not err in refusing to find that the defendant knowingly created a substantial risk of death or serious bodily injury pursuant to §2K1.4(a)(1). The circuit court ruled that the district court was not clearly erroneous in finding that the defendant's commission of arson did not substantially endanger the firemen.

United States v. Condren, 18 F.3d 1190 (5th Cir.), *cert. denied*, 513 U.S. 856 (1994). The district court did not err in finding that the defendant used or possessed a firearm "in connection with" another felony offense. Section 2K2.1(b)(5) mandates an enhancement if the defendant "used or possessed any firearm or ammunition *in connection with* another felony offense." (*Emphasis added*.) The district court correctly found that a firearm located in close proximity to narcotics, fully loaded and readily available to the defendant to protect drug-related activities is a firearm that was used in connection with the drug offense.

United States v. Jackson, 22 F.3d 583 (5th Cir. 1994). The district court erred in its base offense level determination because the defendant's prior felony conviction was not a crime of violence within the meaning of §2K2.1(a)(4)(A). The defendant argued that the district court should not have characterized his prior burglary of a building as a crime of violence when sentencing him for being a felon in possession of a weapon. The lower court read the definition of a "crime of violence" in §4B1.2 as including all burglaries. The circuit court disagreed. Whether an offense is a crime of violence turns on the conduct of which the defendant was previously convicted. The state penal code under which the defendant was convicted distinguished between burglary of a building and burglary of a habitation, the latter always presenting "a substantial risk that force will be used." United States v. Flores, 875 F.2d 1110, 1113 (5th Cir. 1989). This conclusion is supported by the definition of a "crime of violence" found in §4B1.2 which specifies only a "burglary of a dwelling" as a crime of violence. The court of appeals did note, however, that the defendant's conduct might still be considered a "`crime of violence' if it presented a `serious potential risk of physical injury to another.'" 22 F.3d at 585. The defendant's conduct did not justify such a finding in this instance.

United States v. Kirk, 111 F.3d 390 (5th Cir. 1997). In an issue of first impression, the district court did not err in enhancing the defendant's base offense level based upon a finding that his prior conviction for sexual indecency with a child involving sexual contact constituted a crime of violence. The court referred to the definition of "crime of violence" in §4B1.2(a)(2), which states that a crime of violence is an offense punishable by imprisonment for a term exceeding one year that ". . . otherwise involves conduct that presents a serious potential risk of physical injury to another." The court addressed this issue by analogy to its determination that, in the context of 18 U.S.C. § 16, indecency with a child involving sexual contact constitutes a crime of violence. The reasoning in such cases presumes that adults are larger and stronger than children and there is always the risk that an adult will use physical force to ensure his victim's compliance. Whenever there exists a risk of physical force, there exists a risk that physical injury will result. The threat of violence in such cases is inherent in the size, age and authority position of an adult dealing with a child. The facts of this case were such that the defendant lured his victim, an eight-year-old boy, into a secluded area of a local park using deceit and then sexually molested the boy. This constituted a crime of violence.

United States v. Luna, 165 F.3d 316 (5th Cir.), *cert. denied*, 526 U.S. 1126 (1999). A defendant who is convicted of possession of stolen firearms, in violation of 18 U.S.C. § 922(j), is not subjected to impermissible double-counting when the sentencing court enhances his offense level under §2K2.1 on the basis of both the fact that he possessed firearms in connection with the

burglary in which he stole them, §2K2.1(b)(5), and the fact that the firearms he possessed were stolen, §2K2.1(b)(4). First, the unambiguous language of §2K2.1 and its commentary authorize application of both subsections. Second, there are significant differences between the aims of the two subsections. Finally, even assuming that application of both subsections does amount to double-counting, such double-counting was intended by the guidelines because the Sentencing Commission provided no express exception to the application of both subsections.

United States v. Mitchell, 166 F.3d 748 (5th Cir. 1999). The district court erred in applying §2D1.1, the drug guideline, using the cross reference in §2K2.1(c) based on the defendant's possession of a gun. The record did not show that the defendant possessed the firearm "in connection with the commission or attempted commission" of a drug possession offense. The gun, but no drugs, was recovered from the defendant's car; the drugs were recovered from his girlfriend's house in a locked box in the living room; there was no evidence that the car was used to transport drugs; and no evidence of "either spatial or functional proximity of the gun in the car and the drugs in the house." The requirement in §2K2.1(c) that a firearm be possessed in connection with the commission of another offense "mandate[s] a closer relationship between the firearm and the other offense than that required" under §2K2.1(b)(5). *Id*. at 756.

United States v. Rome, 207 F.3d 251 (5th Cir. 2000). The district court erred in applying a six-level enhancement under §2K2.1(b)(1)(F) based on the PSR's assertion that the defendant's offense involved more than 50 firearms, where the assertion was not otherwise supported by the record. The defendant pled guilty to conspiracy to steal firearms. The defendant and an accomplice had twice attempted to break into separate businesses to steal firearms, but were caught by the owner before stealing anything. At the request of the government, the PSR asserted that the defendants would have stolen the entire inventory of firearms in each store if they had not been interrupted. "To allow such inferences to support this sentencing enhancement would essentially charge every burglar with intending to steal every visible item within a targeted location so long as it would be 'possible' to load all of the items into a getaway car." *Id*. at 256.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Dabeit, 231 F.3d 979 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1214 (2001). The district court did not err in applying the 16-level enhancement under §2L1.2 based on the existence of the defendant's prior conviction for conspiracy to perpetrate a checking and savings account kite scheme in violation of 18 U.S.C. §§ 1014 and 2113(b). The presentence report's recommendation of a 16-level enhancement was based on identifying the defendant's prior conviction as an "aggravated felony." On appeal, the defendant argued that the government failed to meet its burden of proof in demonstrating that his prior conviction constituted an "aggravated felony" under §2L1.2(b)(1)(A). The Fifth Circuit disagreed and found that the defendant's prior conviction, for which he was sentenced to four years imprisonment, in violation of 18 U.S.C. § 2113(b), involves the taking of another's property. The court held that the district court correctly enhanced the defendant's sentence because the defendant's prior conviction fits within the definition of a theft offense and his sentence was for more than one year. *But see* United States v. Chapa-Garza, 243 F.3d 921, 927-28 (5th Cir. 2001) (holding that felony DWI is not a crime of

violence as defined by 18 U.S.C. § 16(b) because intentional force against the person or property of another is seldom, if ever, employed to commit the offense of felony DWI.).

United States v. Valdez-Valdez, 143 F.3d 196 (5th Cir. 1998). The district court did not err in finding that the defendant's deferred adjudication after a guilty plea on Texas state charges was a "prior felony" for the §2L1.2(b)(1) sentence enhancement. The defendant argued that even though he pled guilty to the Texas charge, the deferred adjudication was never converted to a conviction and no adjudication of guilt was ever entered. The court of appeals concluded that the deferred adjudication constituted a prior felony conviction, as the guidelines provide that deferred adjudications resulting from a finding or admission of guilt are to be considered in computing the criminal history category.

Part P Offenses Involving Prisons and Correctional Facilities

§2P1.1 Escape, Instigating or Assisting Escape

United States v. Mendiola, 42 F.3d 259 (5th Cir. 1994). The circuit court ruled that §2P1.1 does not violate equal protection even though it treats persons convicted of driving while intoxicated in Texas, where the offense is punishable by two years in jail, more harshly than persons convicted for the same offense in states where the maximum penalty is less than one year. The defendant pled guilty to escaping from federal custody, but was ineligible for the offense level reduction provided in §2P1.1(b)(3) because the drunk driving offense for which he was convicted while on escaped status was punishable by a term of one year or more under state law. The defendant acknowledged that the guideline was subject only to rational basis review, and that there was a legitimate governmental purpose for denying offense level reductions to defendants who commit crimes after escaping from federal custody. He argued, however, that the criteria for denying the reduction—focusing on the maximum penalty allowed, rather than the penalty received—was not a rational means for accomplishing this goal. The circuit court disagreed, concluding that the guideline's focus on maximum possible penalty was rational because it reflected the localized determinations of the seriousness of offenses, and such determinations play a significant role in imposing a sentence for escape from federal custody.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.2 Official Victim

United States v. Jones, 145 F.3d 736 (5th Cir.), *cert. denied*, 525 U.S. 988 (1998). The district court did not err in imposing sentence enhancements for both causing bodily injury to a victim and assaulting an official victim, based on conduct toward a single victim. While fleeing a bank robbery, the defendant shot at a pursuing officer, who was injured by glass from a windshield shattered by one of the defendant's bullets. The defendant contended that applying both enhancements constituted double counting. The Sixth and Seventh Circuits have rejected the double counting argument because each enhancement applies to different aspects of the same conduct. *See* United States v. Swoape, 31 F.3d 482 (7th Cir. 1994); United States v. Muhammad, 948 F.2d 1449 (6th Cir. 1991). The Fifth Circuit held that even if it were double counting, it is permissible under the guidelines, since the court has previously held that "double counting is prohibited only if the particular guidelines at issue forbid it." United States v. Morris, 131 F.3d 1136, 1140 (5th Cir. 1997).

United States v. Ortiz-Granados, 12 F.3d 39 (5th Cir. 1994). The district court correctly enhanced the defendant's sentence for assaulting a law enforcement officer pursuant to §3A1.2(b). The defendant was convicted of conspiracy to distribute and possession with intent to distribute marijuana. He argued that the enhancement was in error because his offense was a victimless crime and Application Note 1 clearly states that the guideline applies to offenses involving the "specified victims." The Fifth Circuit rejected this argument, concluding instead that Application Note 1's reading of subsection (b) is plainly unreasonable and it is in direct conflict with Application Note 5. Whereas Application Note 1 would require the result advocated by the defendant, Application Note 5 specifically explains that subsection (b) "may apply in connection with a variety of offenses that are not by nature targeted against official victims." §3A1.2, comment. (n.5). The court of appeals concluded that this language, on its face, indicates that only Application Note 5 applies to §3A1.2(b). Further, Note 5 was added at the same time as subsection (b), whereas Note 1 was not amended when the second subsection was added. Based on this analysis, the Fifth Circuit concluded that the Commission intended that Application Note 1 apply only to subsection (a) and Application Note 5 apply only to subsection (b). This holding is consistent with the Ninth Circuit's decision in United States v. Powell, 6 F.3d 611 (9th Cir. 1993).

Part B Role in the Offense

§3B1.1 Aggravating Role

United States v. Boutte, 13 F.3d 855 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). The defendant was convicted of wire fraud, submitting false claims and making false statements to a federal agency. He appealed his conviction and the enhancement of his sentence under §3B1.1 for his role in the offense as an organizer or leader of five or more people. The defendant argued that the other four individuals involved did not count as participants in the criminal activity under the guidelines because they were not charged or convicted with him. The circuit court rejected this

argument, holding that the other parties need only to have knowingly participated in some part of the criminal enterprise.

See United States v. Godfrey, 25 F.3d 263 (5th Cir.), *cert. denied*, 513 U.S. 965 (1994), p. 7.

United States v. Hare, 150 F.3d 419 (5th Cir. 1998), *overruled on other grounds*, 230 F.3d 160 (5th Cir. 2000). The district court's finding that the defendant was a leader or organizer of a criminal activity involving at least five participants was not clearly erroneous. Although the defendant urged that testimony showed he sometimes took orders from others, the court of appeals noted that, under the guideline, there can be more than one person who qualifies as a leader or organizer of a criminal association.

§3B1.2 Mitigating Role

United States v. Atanda, 60 F.3d 196 (5th Cir. 1995). The district court did not err in refusing to grant the defendant a reduction in offense level pursuant to §3B1.2. The defendant pled guilty to conspiracy to defraud the United States by filing false tax claims. The defendant claimed on appeal that the court misapplied §3B1.2 by refusing to consider the defendant's role in the conspiracy and considering instead the fact that he filed a false return in his own name. In a matter of first impression, the Fifth Circuit concluded, "when a sentence is based on an activity in which a defendant was actually involved, §3B1.2 does not require a reduction in the base offense level even though the defendant's activity in a larger conspiracy may have been minor or minimal." *Id*. At 199. *See* United States v. Lampkins, 47 F.3d 175, 180-81 (7th Cir.), *cert. denied*, 115 S. Ct. 363 (1994); United States v. Olibrices, 979 F.2d 1557, 1561 (D.C. Cir. 1992).

§3B1.3 Abuse of Position of Trust or Use of Special Skill

United States v. Iloani, 143 F.3d 921 (5th Cir. 1998). The district court did not err in enhancing the defendant's sentence for abuse of position of trust. The defendant, a chiropractor, acted in concert with his patients to conduct a fraudulent billing scheme against insurance companies. The enhancement was based on the chiropractor's relationship with an insurance company. The court of appeals compared the case to others in which circuit courts held that defendant physicians occupied positions of trust in their relationship with the government as insurer under Medicare or Medicaid. *See* United States v. Rutgard, 116 F.3d 1270 (9th Cir. 1997); United States v. Adam, 70 F.3d 776 (4th Cir. 1995). The defendant made medical findings and diagnoses and prescribed treatments and medication, then falsely represented to the insurance company that treatments had been rendered. The district court was entitled to conclude that insurance companies usually rely on the honesty and integrity of physicians in their diagnosis and treatment and that the companies must rely on physician's representations that treatments for which the companies are billed were performed.

Part C Obstruction

§3C1.1 Obstructing or Impeding the Administration of Justice

United States v. Clayton, 172 F.3d 347 (5th Cir. 1999). The defendant, a chief deputy sheriff, kicked an arrestee in the head while she was lying handcuffed on the ground and then allegedly threatened officers at the scene with dismissal if they revealed what he had done. The government sought an upward adjustment for obstruction of justice for this conduct. The Fifth Circuit held, however, that conduct in the nature of obstruction of justice that occurs before an investigation of an offense begins does not trigger the provisions of §3C1.1. Section 3C1.1 requires that the obstruction occur "during the investigation" of the offense. The Court noted an apparent conflict between the text of the guideline and Application Note 3(i), but resolved that conflict by recognizing the note does not compel the conclusion that all conduct prohibited by the statutes mentioned in the note is covered by the obstruction enhancement. The Court also noted that Application Note 1 was recently amended to make clear that §3C1.1 has a temporal element.

United States v. Greer, 158 F.3d 228 (5th Cir.), *cert. denied*, 525 U.S. 1185 (1998). A defendant who unsuccessfully feigns incompetence in order to delay or avoid trial and punishment qualifies for an offense level enhancement for obstruction of justice. So long as the obstruction is willful, the enhancement may apply to defendants with psychological problems or personality disorders.

United States v. McCauley, No. 00-20385, 2001 WL 630151 (5th Cir. June 7, 2001). The district court did not err in sustaining the government's objection for obstruction of justice against the defendant based on his alleged perjury at trial. The defendants were convicted of bank fraud and conspiracy to commit bank fraud. At sentencing the district court found that the defendant made pretrial statements that significantly contradicted his trial testimony and applied the two-level enhancement for perjury under §3C1.1. On appeal, the Fifth Circuit disagreed and held that, based on the defendant's statements before and at trial, the district court did not commit clear error in sustaining the government's objection for obstruction of justice against the defendant. *See also* United States v. Odiodio, 244 F.3d 398, 404-05 (upheld sentence enhancements for the defendant who denied possessing a culpable mental state; the record reflected fourteen instances of perjury by the defendant denying *mens rea*).

United States v. Wilson, 105 F.3d 219 (5th Cir.), *cert. denied*, 522 U.S. 847 (1997). A defendant may be eligible for the safety valve so long as he personally does not possess the firearm, even if codefendants possess firearms.

Part D Multiple Counts

§3D1.2 Groups of Closely Related Counts

See United States v. Bullard, 13 F.3d 154 (5th Cir.), *rev'd on other grounds*, 37 F.3d 160 (1994), p. 4.

United States v. Rice, 185 F.3d 326 (5th Cir. 1999). A defendant's convictions of drug trafficking offenses should be grouped, under §3D1.2, with his convictions of laundering the proceeds of the drug trafficking. Here, the defendant's money laundering sentence was enhanced under §2S1.1(b) on the basis of his knowledge that the money he was laundering was the proceeds of drug trafficking. Accordingly, the defendant's money laundering and drug trafficking counts should have been grouped under §3D1.2(c) which provides that counts should be grouped when one count embodies conduct that is treated as a specific offense characteristic, or other adjustment to, the guideline applicable to another of the counts. In so holding, the Court distinguished United States v. Gallo, 927 F.2d 815 (5th Cir. 1991), which held that money laundering convictions were not to be grouped with convictions for underlying offenses, because Gallo did not address subsection (c) of 3D1.2 and instead relied on United States v. Halstrom, 113 F.3d 43 (5th Cir. 1997), which concerned a defendant who was convicted of fraud and of failing to report the proceeds from the fraud on his income taxes.

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). The district court erred by not grouping the money laundering count with the conspiracy count under §3D1.2(c). The presentence investigation report (PSR) prepared for sentencing did not group the two offenses. Instead, it determined that the base offense level (BOL) for the conspiracy charge was 26, with an adjusted offense level of 30 and the BOL for the money laundering charge was 23, with an adjusted level of 28. Under §3D1.4 the combined offense level determined was 32, less three levels for acceptance of responsibility, resulting in an offense level of 29. The defendant objected to the money laundering count not being grouped with the conspiracy count under §3D1.2 but his objection was overruled. On appeal, the Fifth Circuit determined that the PSR added three points to the money laundering offense level because the defendant knew that the funds were the proceeds of an unlawful activity involving the distribution of narcotics or other controlled substance. The court found that this was the exact conduct embodied by the drug trafficking count of conviction and held that grouping of these charges was required and that the district court's failure to do so was in error.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Brace, 145 F.3d 247 (5th Cir.), *cert. denied*, 525 U.S. 973 (1998). The district court did not err in refusing to grant the defendant a three-level reduction for acceptance of responsibility. The defendant argued that he fully admitted his factual guilt, but went to trial only to preserve the "legal issue" of entrapment. The court of appeals, rejecting this argument, noted that an entrapment defense is a challenge to criminal intent and, thus, to culpability. The defendant could not, therefore, proceed to trial and still satisfy §3E1.1(a).

United States v. Brenes, 250 F.3d 290 (5th Cir. 2001). The defendant was convicted of conspiracy to possess with intent to distribute more than 1,000 kilograms of marijuana. The presentence report recommended an offense level of 26 with no adjustment for acceptance of responsibility and no reduction under the safety valve provision. At sentencing, the defendant continued to blame his involvement in the conspiracy on another defendant until the judge repeatedly warned him that his sentence would not be reduced unless he was willing to accept

responsibility for his crime. The defendant at that point admitted his involvement. Additionally, the defendant, during a recess at the sentencing hearing, provided sufficient information to the DEA agent to entitle the defendant to a two-level safety valve reduction. The district court applied both adjustments and the government appealed, arguing that the defendant had not accepted responsibility and also failed to qualify for the safety valve because his cooperation did not occur before commencement of the sentencing hearing. The court vacated the defendant's sentence and held that the district court erred by reducing defendant's offense level for acceptance because acceptance of responsibility within the meaning of the Sentencing Guidelines was not acceptance if it was a product of repeated warnings by the judge at the sentencing hearing. The court further held that the safety valve reduction was not warranted because the defendant's cooperation did not occur until after the commencement of the sentencing hearing.

United States v. Pierce, 237 F.3d 693 (2001). The district court did not commit reversible error in considering the defendant's denial that the individual depicted in a sexually explicit photograph was minor, when the court refused to grant downward adjustment for acceptance of responsibility. The defendant's presentence reports indicated that the defendant "claimed he pled guilty to the instant offense simply to get a reduced sentence, not because he did anything wrong" and also "denied that he permitted minors to engage in sexually explicit conduct (*i.e.*, posing for sexually explicit photographs)." 237 F.3d 693, 694. The district court, after hearing the defendant's statements, denied the defendant's objections to the PSR and refused to grant the defendant a reduction based on acceptance of responsibility.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Arnold, 213 F.3d 894 (5th Cir. 2000). In determining whether a sentence of less than 13 months occurred during the ten-year period prior to the commencement of the offense of conviction, the court should look to the date on which the previous court announced the sentence and not to the date on which the defendant began serving his sentence. In this case, the defendant was convicted of a federal offense committed in February 1999. He had received a term of two years' probation and a suspended sentence of 90 days. His probation was revoked in September 1989, at which time he began serving the suspended sentence. Under §4A1.2(e)(1), subsection (2), a sentence under 13 months counts as a prior sentence if it was "*imposed* within ten years of the defendant's commencement of the instant offense." (*Emphasis added.*)

United States v. Brooks, 166 F.3d 723 (5th Cir. 1999). A ten-year state term in a "special alternative incarceration program (boot camp)," followed by probation, was properly considered by a sentencing court as a prior "sentence of imprisonment" for purposes of determining the defendant's criminal history category under §4A1.1. The defendant argued that because the purpose of the boot camp was rehabilitation rather than punishment, it failed to meet the definition of imprisonment. According to the Fifth Circuit, however, physical confinement is the crucial

factor for determining what constitutes imprisonment. The commentary to §4A1.1 explains that "confinement sentences" of over six months qualify as a "sentence of imprisonment" under §4A1.2(b), and it expressly distinguishes types of sentences not requiring round-the-clock physical confinement. The defendant was not free to leave the boot camp and, therefore, his sentence fit the category of incarcerations defined as a "sentence of imprisonment."

United States v. Corro-Balbuena, 187 F.3d 483 (5th Cir. 1999). The defendant was deported three times between 1991 and 1994. In 1994, the defendant was again deported after sustaining a conviction for driving while intoxicated. Afterwards, the defendant again illegally reentered the United States while still under a sentence of probation. The defendant was subsequently convicted of auto theft in April 1995 and sentenced to 140 days' confinement. The defendant claimed that he voluntarily returned to Mexico after completing the 140-day sentence, and he remained there until November 1997, when for the fifth time he illegally reentered the United States. In 1998, the defendant pled guilty to being found in the United States after deportation. The district court applied two criminal history points under §4A1.1(d) for committing the offense while under a criminal justice sentence. The court ruled that any of the dates on which the defendant illegally reentered the United States after deportation could be used as the start date of the offense, which continued until defendant was found by the INS in January 1998. The Fifth Circuit concurred, finding that any of the multiple prior illegal reentries could be used, either as part of the current offense or as relevant conduct, to support the application of §4A1.1(d).

United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000). Driving while intoxicated constitutes a crime of violence under the "otherwise" clause in §4B1.2. The "very nature of the crime of DWI presents a 'serious risk of physical injury' to others." *Id*. At 264. (*Citing* United States v. Rutherford, 54 F.3d 370 (5th Cir. 1995)). In this case the defendant was convicted of unlawful reentry and the defendant's three misdemeanor DWI convictions warranted a four-level increase under §2L1.2.

United States v. Holland, 26 F.3d 26 (5th Cir. 1994). The district court did not err in including in its criminal history calculation the defendant's state juvenile adjudication. The defendant argued that the juvenile adjudication should not have been included because the state used such adjudications to avoid the taint of criminality. The circuit court disagreed and held that since the defendant's guilt was established at the juvenile proceedings, the adjudication was essentially the same as being convicted of an offense for criminal history purposes.

United States v. Jackson, 220 F.3d 635 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1640 (2001). The Texas offense of unauthorized use of a vehicle meets the definition of "crime of violence" under the "otherwise" clause in §4B1.2. The defendant properly received a base offense level of 24 under §2K2.1 based on two convictions for unauthorized use of a vehicle. A court may not consider the specific conduct underlying a conviction to determine whether it is a crime of violence, but using the categorical approach, an unauthorized use of a vehicle offense presents a "strong probability" that the vehicle will be involved in or will cause a traffic accident. (*Citing* United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir.), *cert. denied*, 120 S. Ct. 100 (1999), an immigration case, which held that unauthorized use of a vehicle is a crime of violence under 18 U.S.C. § 16.)

United States v. Mota-Aguirre, 186 F.3d 596 (5th Cir. 1999). The defendant, a Mexican national, had been sentenced in a Texas court to prison terms for three child indecency offenses but was given an "out-of-the-country" conditional pardon by the state governor. The pardon provided for the defendant's release into the custody of immigration officials for immediate deportation to Mexico and stated that if he returned to the United States illegally, the pardon would be revoked and he would be returned to the state corrections department. The defendant violated this condition and was convicted in federal court of illegal re-entry after deportation. At sentencing, the district court increased his criminal history score by two points by counting his conditional pardon as a "criminal justice sentence" under §4A1.1(d). The Fifth Circuit affirmed reasoning that Texas law generally classifies parole as a conditional pardon and parole qualifies under §4A1.1(d) as a "criminal justice sentence."

United States v. Robinson, 187 F.3d 516 (5th Cir. 1999). The district court erred in refusing to treat two prior state convictions for delivery of cocaine as related cases. The crimes were temporally and geographically close and factually connected.

United States v. Ruiz, 180 F.3d 675 (5th Cir. 1999). The defendant's conviction for knowing escape from federal prison camp constituted a "crime of violence" for purposes of career offender guideline.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Ashburn, 20 F.3d 1336 (5th Cir.), *reinstated in part on reh'g en banc*, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). Although the defendant's Youth Corrections Act conviction was "set aside," it is not an "expunged" conviction under §4A1.2(j), and is counted in calculating the defendant's criminal history category. The Fifth Circuit joined the First, Sixth, and Eighth Circuits in concluding that Congress did not intend to allow "expungement of the actual records of a [Youth Corrections Act] conviction," and stated that to do otherwise would allow a "person convicted under its auspices to rewrite his life when his handwriting shows that post-conviction activities are criminal in nature." 20 F.3d at 1343. *But see* United States v. Doe, 980 F.2d 876, 879-82 (3d Cir. 1992).

See United States v. Holland, 26 F.3d 26 (5th Cir. 1994), §4A1.1, p. 18.

United States v. Salter, 241 F.3d 392 (5th Cir. 2001). The district court erred by not combining the defendant's prior conviction for tax evasion with his prior federal conviction for drug trafficking under §4A1.2(a)(2) as "related cases." The defendant pled guilty to conspiracy to possess with intent to distribute and money laundering but had two priors for a drug related conviction and for a conviction for tax evasion. The district court assigned three criminal history points for each prior giving him six total points and a criminal history category of III. The defendant objected, arguing that the prior convictions should have been combined as a part of a "common scheme or plan" because the money that the defendant failed to report on taxes was profit from a drug trafficking venture. His objections were overruled. On appeal, the Fifth Circuit determined that "but for the drug trafficking the defendant would not have had the $75,000 and therefore would not have been subject to conviction for tax evasion." 241 F.3d 392, 396. The court held that these offenses should have been considered part of a "common scheme or plan."

§4A1.3 Adequacy of Criminal History Category

United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994). The district court did not err when it refused to depart downward based on the defendant's community service, good employment record, and potential for victimization. §§ 5H1.5 and 5H1.6 specifically reject community service and employment record as grounds for departure and no authority exists in the Fifth Circuit to allow downward departures on the basis of the defendant's "potential for victimization." In addition, the district court properly refused to depart based on the defendant's status as a first time offender. The guidelines specifically reject first time offender status as a basis for departure because the level of recidivism is adequately reflected by the assignment of Criminal History Category I.

United States v. Ashburn, 20 F.3d 1336 (5th Cir.), *reinstated in part on reh'g en banc*, 38 F.3d 803 (5th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). The district court erred by not explaining the factual and/or legal justifications for departing upward from a guideline range of 63-78 months to 180 months. When a departure is this severe the court must explain in "careful detail" why it found lesser adjustments inadequate. The district court further erred by allowing charges, which were dismissed pursuant to a plea agreement, to serve as a basis for the departure. "To allow consideration of dismissed counts in an upward departure eviscerates the plea bargain." 20 F.3d at 1346. The sentence was vacated and remanded.

United States v. Rosogie, 21 F.3d 632 (5th Cir. 1994). The district court did not err by adding one offense level for each criminal history point above the 13 points of category VI and assessing 4 additional levels. This upward departure was appropriate because of the defendant's 23 criminal history points, his 26 different aliases, his 10 convictions in a ten-year period, his incarceration in three different states, and his two deportations. In considering an issue of first impression, the circuit court held that the district court may consider as relevant conduct facts that are the basis of a pending state prosecution. This ruling adopts the holding of United States v. Caceda, 990 F.2d 707, 709 (2d Cir.), *cert. denied*, 114 S. Ct. 312 (1993).

Part B Career Offenders and Criminal Livelihood

§4B1.2 Definitions of Terms Used in Section 4B1.1

United States v. Jackson, 220 F.3d 635 (5th Cir. 2000) (Jackson II). In this case the court addressed again the issue previously addressed in United States v. Jackson, 22 F.3d 583 (5th Cir. 1994) (Jackson I) of whether courts should consider the underlying facts detailing how the crime was committed, in order to determine if the crime is a "crime of violence" as defined under §4B1.2.[2] The court specifically stated that United States v. Fitzhugh, 954 F.2d 254 (5th Cir. 1992), was the controlling case law in the Fifth Circuit. 220 F.3d 635, 639. Fitzhugh precluded the court from looking to the underlying facts of the conviction, but rather, required that courts first look to the categorical issue and then to the specific conduct if it was described in the charging instrument. *Id.* at 638. The court noted that had the Fitzhugh principle been applied to Jackson I, the court would have determined whether the crime of burglary of a building—without considering the specific conduct in that instance—was per se a "crime of violence" by first considering the categorical issue. If after such consideration the court determined that burglary of a building was not a "crime of violence," it could then determine whether the facts in the charging instrument demonstrated a "serious potential risk of physical injury to another." *See also* United States v. Kirk, 111 F.3d 390, 395 (5th Cir. 1997) (holding that the crime of indecency with a child involving sexual contact was, as a categorical matter and as defined in the statute, was a crime of violence).

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

United States v. Edwards, 65 F.3d 430 (5th Cir. 1995). The district court did not err by refusing to grant a downward departure under §5C1.2 (safety valve). The defendant asserted that the fact that he received a reduction in his offense level based on his acceptance of responsibility under §3E1.1 "suggests that he qualifies" for the §5C1.2 departure. The circuit court did not agree, and affirmed the district court's factual determination that the defendant did not satisfy the requirement that he truthfully provide to the government all relevant information. The circuit court concluded that the defendant offered testimony at sentencing which directly contradicted information gathered by the government, and gave conflicting statements regarding the amount of

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[2] The holding in Jackson I was that a "crime of violence" for purposes of §4B1.2 was one that met the following criteria: A) Involves conduct that is in the charging instrument and the defendant is convicted of; and B)(1) has, as a categorical matter, been defined as a crime of violence either by statute or case law; or (2) "has as an element the use, attempted use, or threatened use of physical force against the person of another;" or (3) "is burglary of a dwelling . . . . or otherwise involves conduct that presents a serious potential risk of physical injury to another." The court found that the burglary of a building by attempting to take parts from an air conditioning unit in the backyard of a vacant house was not burglary of a dwelling and that specific conduct involved did not "present a serious potential risk of physical injury to another."

drugs he had received. Thus, the defendant did not satisfy the requirement that he provide truthful information.

United States v. Flanagan, 80 F.3d 143 (5th Cir. 1996). In addressing an issue of first impression in the circuit, the court held that "the defendant has the burden of ensuring that he has provided all the information and evidence regarding the offense to the Government." *Id*. at 146-47. The government appealed the district court's application of the safety valve provision of §5C1.2 to the defendant, who failed to affirmatively provide the government with information regarding the offense. At sentencing, the government argued that the district court should not apply the safety valve provision of 18 U.S.C. § 3553(f) because the defendant had not truthfully provided to the government all information and evidence he had regarding the offense. Noting that the government had never requested any information from the defendant, the district court sentenced the defendant under the safety valve provision. On appeal, the government contended that it did not have the burden of attempting to solicit information from the defendant. The Fifth Circuit agreed. The court held that the language of the safety valve provision indicates that the burden is on the defendant to provide the government with all information and evidence regarding the offense. According to the court, the defendant has the burden of providing this information regardless of whether the government requests such information. *See also* United States v. Ivester, 75 F.3d 182 (4th Cir. 1996) (holding that the burden is on the defendant to demonstrate that he has supplied the government with truthful information regarding the offenses at issue).

United States v. Flanagan, 87 F.3d 121 (5th Cir. 1996). The district court erred in failing to consider whether the defendant was eligible for the safety valve (§5C1.2). The circuit court held that the district court did not consider the criteria listed in §5C1.2, and mistakenly believed that it was bound by the mandatory minimum sentence set forth in 21 U.S.C. § 841(b))(1)(A). The circuit court vacated the defendant's sentence and remanded for resentencing to determine if the safety valve applied to the defendant.

United States v. Rodriguez, 60 F.3d 193 (5th Cir.), *cert. denied*, 516 U.S. 1000 (1995). The district court did not err in refusing to apply the safety valve provision (§5C1.2) of 18 U.S.C. § 3553(f) to the defendant because the defendant did not satisfy all the requirements necessary for the court to apply §5C1.2. In addressing an issue of first impression among the courts of appeals, the circuit court held that a probation officer is not, for purposes of §5C1.2, "the Government." The defendant was able to meet the first four requirements of §5C1.2 because: 1) he did not have more than one criminal history point, 2) he did not use violence or a threat of violence, 3) no serious injury or death resulted, and 4) he was not a leader, supervisor, manager, or organizer. However, the circuit court ruled that the defendant failed to meet part five of §5C1.2 which states that the defendant must truthfully provide to the government all information and evidence the defendant has concerning the offense. The government argued that §5C1.2 should not apply because the defendant had spoken only to the probation officer, not the government's case agent. The defendant unsuccessfully argued that his discussion with the probation officer satisfied the requirement to disclose to the government all information that he knows about the criminal offense. The circuit court rejected this argument, noting that a defendant's statements to a probation officer do not assist the government. The probation officer is not the government for purposes of §5C1.2. The district court's decision was affirmed.

United States v. Stewart, 93 F.3d 189 (5th Cir. 1996). In an issue of first impression, the Fifth Circuit held that the information requirement of §5C1.2(5) is constitutional and does not impose cruel and unusual punishment on the defendant. The district court found that the defendant did not provide the government with all the information available to her because the defendant did not identify the other participants in the methamphetamine operation. The defendant argued that §5C1.2(5) is unconstitutional because it subjects herself and her family to violent retaliation by the people she is required to identify and forces her to work as an informant for the government. The court noted that the Fifth Circuit had addressed similar challenges to §3E1.1. In United States v. Mourning, 914 F.2d 699, 707 (5th Cir. 1996), the court held that §3E1.1 was constitutional. The court stated: "[t]o the extent the defendant wishes to avail himself of this provision, any dilemma he faces in assessing his criminal conduct is one of his own making." 93 F.3d at 195-96. Here, the circuit court upheld the constitutionality of §5C1.2(5) stating: ". . . a more lenient sentence imposed [] on a defendant who gives authorities all of the information possessed by the defendant does not compel a defendant to risk his or her family's lives." *Id*. at 196. The court added that a defendant can refuse the option and receive the statutory sentence under the regular sentencing scheme.

United States v. Wilson, 105 F.3d 219 (5th Cir.), *cert. denied*, 522 U.S. 847 (1997). The district court erred in concluding that the safety valve was not available to the defendant because his co-conspirator possessed a firearm during the commission of the offense. The district court ruled that because a firearm was involved in the conspiracy, the defendant failed to meet the requirement that the defendant not possess a firearm in connection with the offense. §5C1.2(2). The defendant contended that the district court erred in concluding that the safety valve provision was unavailable to him because it was his co-conspirator, not he, who possessed the firearm. The circuit court concluded that in determining a defendant's eligibility for the safety valve, §5C1.2(2) allows for consideration of only the defendant's conduct, not the conduct of his co-conspirators. The circuit court stated that the commentary to §5C1.2(2) provides: "[c]onsistent with §1B1.3, the term "defendant," as used in subdivision (2), limits the accountability of the defendant to his own conduct and conduct that he aided or abetted, counseled, commanded, induced, procured, or willfully caused." 105 F.3d at 222 (*quoting* §5C1.2, comment. (n.4)). The appellate court noted that this language mirrors §1B1.3(a)(1)(A), but omits the text of §1B1.3(a)(1)(B) which provides that "relevant conduct" encompasses acts and omissions undertaken in a "jointly undertaken criminal activity." Therefore, as it was the defendant's co-conspirator, and not the defendant himself, who possessed the gun during the conspiracy, the defendant was eligible to receive the benefit of §5C1.2.

Part D Supervised Release

§5D1.3 Conditions of Supervised Release

United States v. Quaye, 57 F.3d 447 (5th Cir. 1995). The district court erred in ordering the defendant to be deported as a condition of supervised release. The defendant pled guilty to making false statements on immigration documents and education grant applications. The defendant was sentenced to ten months' incarceration and was ordered to be deported as a condition of supervised release. On appeal, he argued that the district court exceeded its authority in ordering him deported under 18 U.S.C. § 3583(d) as a condition of supervised release. In considering an issue of first impression, the circuit court joined the First Circuit in ruling that 18 U.S.C. § 3583(d) does not authorize district courts to order deportation, but instead permits sentencing courts to order that a defendant be surrendered to immigration officials for deportation proceedings as a condition of supervised release. *See* United States v. Sanchez, 923 F.3d 236, 237 (1st Cir. 1991) (*per curiam*). The circuit court noted that the language of the statute authorizes district courts to "provide" not "order" that an alien be deported and remain outside the United States. The fact that Congress even used the verb "order" elsewhere in the statute implies that the choice of the verb "provide" was intentional in this situation. Further, the circuit court recognized Congress's tradition of granting the Executive Branch sole power to institute deportation proceedings. The circuit court noted its unwillingness to conclude that Congress intended to change this tradition through silence. The circuit court held that the district court exceeded its statutory power under § 3853(d) in ordering that the defendant be deported as a condition of supervised release. The court noted that the First and Eleventh Circuits have split on this issue. In United States v. Chukwura, 5 F.3d 1420, 1423 (11th Cir. 1993), *cert. denied*, 513 U.S. 830 (1994), the Eleventh Circuit interpreted § 3853(d) to give sentencing courts the power to order deportation as a condition of supervised release. The Eleventh Circuit further held that this authority was not a intrusion upon the Immigration and Naturalization Service's authority to deport resident aliens because the INS retains the power to carry out deportations. *See id*. at 1423.

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.2 Fines for Individual Defendants

United States v. Hodges, 110 F.3d 250 (5th Cir. 1997). The district court's imposition of a $10,000 fine on the defendant was in error. Relying on United States v. Fair, 979 F.2d 1037, 1041 (5th Cir. 1992), the defendant asserted that because he is insolvent, the fine was imposed in error. Fair states that "when a sentencing court adopts a PSR which recites facts showing limited or no ability to pay a fine the government must come forward with evidence showing that a defendant can in fact pay a fine before one can be imposed." 979 F.2d at 1041. In the case at hand, the district court adopted the PSR findings that indicated the defendant had only $50 in the bank, a monthly income of $1,410, and unsecured debt of $61,399. With $2,879 in necessary living expenses, the defendant would have a monthly net loss of $1,469. The PSR also notes that "it would be difficult" for the defendant to pay. Based on Fair, in situations as this, the burden is on the government to provide evidence showing the defendant's ability to pay a fine. Because the government did not do so, the imposition of a fine was in error. The circuit court noted that its decision in United States v. Altamirano, 11 F.3d 52 (5th Cir 1993), is not inconsistent with Fair as it merely states that neither the Constitution nor federal law categorically prohibits the imposition

of a fine on a defendant found to be indigent. The circuit court remanded to the district court for specific findings as to the defendant's financial status.

§5E1.4 Forfeiture

United States v. Tencer, 107 F.3d 1120 (5th Cir.), *cert. denied*, 522 U.S. 960 (1997). The district court erred in reducing its forfeiture order, under 18 U.S.C. § 982(a)(1), after five of eleven money laundering counts of conviction were vacated. The defendant was convicted, *inter alia*, of 18 counts of money laundering and assessed a special forfeiture verdict of $1,598,645.18. The district court vacated five counts and the forfeiture verdict related to them. The district court then reduced the forfeiture verdict representing the balance on deposit in the California Federal bank account used in relation to the remaining money laundering counts, from $1,055,395.71 to $700,000. The defendant asserts that the order includes amounts from legitimate activities and should, therefore, be completely reversed. The government contends that the original verdict should be reinstated based on the fact that any legitimate money that may have been in the bank account "involved and `facilitated' the offense by providing a cover for the tainted funds." *Id*. at 1134. The forfeiture statute at issue, 18 U.S.C. § 982(a)(1), states that persons sentenced for a section 1956 conviction shall be ordered to "forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property." The appellate court held that the commingling of legitimate and illegitimate funds does not, in and of itself, make the entire account forfeitable. In this case, the appellate court found that the defendant transferred the funds, both legitimate and illegitimate, into the account within a few days to conceal the true nature and source of the proceeds from the underlying mail fraud. The evidence was sufficient for the jury to infer that all of the funds in the account were "involved in" the money laundering and subject to forfeiture pursuant to the mandatory provisions of section 982. The district court was directed to reinstate the jury's original forfeiture award on remand.

Part G Implementing The Total Sentence of Imprisonment

§5G1.3 Imposition of Sentence on Defendant Subject to an Undischarged Term of Imprisonment

United States v. Alexander, 100 F.3d 24 (5th Cir. 1996), *cert. denied*, 520 U.S. 1128 (1997). The district court did not err in holding that the language "should be imposed to run consecutively," found in Application Note 6 of §5G1.3, mandates that the sentence for the defendant's offense of illegal purchase of firearms run consecutively to his undischarged state sentence for attempted murder. The court noted that although paragraph (c) of §5G1.3 is a catch-all provision and is designated a policy statement, both paragraph (c) and Application Note 6 are binding upon the court to the extent that they interpret the guidelines and do not conflict with the guidelines or with any statutory directives. *See* Williams v. United States, 503 U.S. 193 (1992). Such policy statements are binding upon the court because they inform the uniform application of the guidelines. The defendant argued that the language was not mandatory, in that it says "should," as opposed to "shall," and that such an interpretation conflicts with the circuit's prior decision in United States v. Hernandez, 64 F.3d 179, 182 (5th Cir. 1995). In rejecting these arguments, the appellate court noted that the word "should" is construed as mandatory, given the absence of any qualifications or reservations. Further, the facts of this case are distinguishable from those in Hernandez because the note at issue in that case contained limiting language that the

methodology it set forth was meant to "assist the court in determining the appropriate sentence" and need be followed only to "the extent practicable." 100 F.3d at 27 (*quoting* §5G1.3, comment. (n.3)). Because there is no limiting language in this case, nothing in the Hernandez case precludes the court from construing this note as mandatory.[3]

United States v. Hernandez, 64 F.3d 179 (5th Cir. 1995). The district court erred in failing to consider §5G1.3(c) and its methodology, or explain why §5G1.3(c) was not employed in sentencing the defendant. The district court sentenced the defendant to a consecutive 120-month term of imprisonment. The defendant argued that his sentence should be imposed concurrently and not consecutively. The circuit court held that the district court's failure to follow the strictures of §5G1.3, which requires consecutive sentences only "to the extent necessary to achieve a reasonable incremental punishment for the instant offense" amounted to plain error. The circuit court noted that the §5G1.3(c) policy statement is binding on district courts because it completes and informs the application of a particular guideline. The circuit court stated that although the district court maintains discretion to reject the suggested methodology, it must consider the methodology's possible application. If the district court chooses not to follow the methodology, it must explain why the calculated sentence would be impracticable in that case or the reasons for using an alternative method. The circuit court vacated the district court's decision and remanded for resentencing because "the district court did not consider §5G1.3(c), its methodology, or explain why it was not employed." *Id*. at 183.

United States v. Richardson, 87 F.3d 706 (5th Cir. 1996). The district court did not err in imposing a consecutive sentence in contradiction to the PSR recommendation that §5G1.3 applied and mandated concurrent sentences. The defendant argued that the imposition of a consecutive sentence in this case was an abuse of discretion because the judge failed to consider factors set forth in 18 U.S.C. § 3553(a) required to be considered under 18 U.S.C. § 3584. Although the judge did not explicitly refer to section 3553 in his opinion, he did state orally that he considered "the sentencing objectives of punishment and deterrence." The appellate court accepted this statement as implying a general consideration on the part of the district court of the different factors embodied in section 3553. The statement was not detailed and specific, but it was not so lacking as to evince a disregard of section 3553 factors. Therefore, the district judge did not abuse his discretion in imposing consecutive sentences.

Part H Specific Offender Characteristics

§5H1.5 Employment Record (Policy Statement)

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[3] Note that there is a circuit split on the issue of whether or not Application Note 6 to §5G1.3 is mandatory or permissive. *Compare* United States v. McCarthy, 77 F.3d 522, 539-40 (1st Cir. 1996) (holding that note 6's language is mandatory), and United States v. Goldman, 228 F.3d 942, 944 (8th Cir. 2000) (same), and United States v. Bernard, 48 F.3d 427, 430-32 (9th Cir. 1995) (same), *with* United States v. Maria, 186 F.3d 65, 70-73 (2d Cir. 1999) (holding that note 6 uses the word "should" rather than "shall," and is therefore, permissive), and United States v. Walker, 98 F.3d 944, 945 (7th Cir. 1996) (indicating, *in dicta*, that note 6 creates a "strong presumption in favor of consecutive sentencing"), and United States v. Tisdale, 248 F.3d 964, 977-78 (10th Cir. 2001) (holding that the plain meaning of the word "should" indicates that it is permissive and not mandatory and that the structure and comments of §5G1.3 also support this conclusion).

See United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994), p. 20.

§5H1.6 Family Ties and Responsibilities, and Community Ties (Policy Statement)

See United States v. Ardoin, 19 F.3d 177 (5th Cir.), *cert. denied*, 513 U.S. 933 (1994), p. 20.

§5H1.10 Race, Sex, National Origin, Creed, Religion and Socio-Economic Status (Policy Statement)

United States v. Stout, 32 F.3d 901 (5th Cir. 1994). The district court's upward departure in sentencing a former judge for tax evasion was not erroneous even though the court included the defendant's socio-economic status as one of six reasons for departing. The circuit court held that the district court's consideration of the defendant's affluent lifestyle and status as a judge, although improper under §5H1.10, was harmless error because the district court relied on four other acceptable factors in its decision to depart. These factors, the circuit court held, were sufficient to justify the departure without consideration of the defendant's socio-economic status.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (and 18 U.S.C. § 3553(e))

United States v. Johnson, 33 F.3d 8 (5th Cir. 1994). The district court granted substantial assistance departures to the defendants, but departed down only ten months, as recommended by the government. The district court must exercise its judgment in determining the propriety and extent of a §5K1.1 departure; the government's recommendation is but one factor to be considered by the court. The defendant's argument—that the district court has a duty to conduct an independent inquiry into each defendant's case to determine whether the decision to depart and the extent of the departure is appropriate—is correct. Because it is unclear from the record whether the sentencing court adequately recognized its duty to evaluate independently each defendant's case before making the §5K1.1 determinations, the sentences were vacated and the case remanded.

United States v. Okoli, 20 F.3d 615 (5th Cir. 1994). The government moved for departure below the guidelines sentence pursuant to §5K1.1. However, the district court did not err when it declined to depart downward from the statutory minimum sentence. The circuit court held that it is not necessary for the government to make a separate motion for a downward departure below the statutory minimum under 18 U.S.C. § 3553. However, in this case, there was no evidence that the defendant requested departure below the minimum or that the district court abused its discretion in declining to so depart on its own motion.

United States v. Solis, 169 F.3d 224 (5th Cir. 1998), *cert. denied*, 120 S. Ct. 112 (1999). Persuaded by the Third Circuit's reasoning in United States v. Abuhouran, 161 F.3d 206 (3d Cir. 1998), the Fifth Circuit held that §5K2.0 does not afford district courts any additional authority to consider substantial assistance departures without a Government motion. Because the Government

did not bargain away its discretion to refuse to offer a §5K1.1 motion and the defendant did not allege that the Government refused to offer the motion for unconstitutional reasons, the district court was held to have erred by granting a five-level downward departure.[4]

United States v. Underwood, 61 F.3d 306 (5th Cir. 1995). In considering an issue of first impression, the appellate court held that the promulgation of policy statement §5K1.1 was not an ultra vires act of the United States Sentencing Commission. The defendant pled guilty to possession of counterfeit currency. The plea agreement between the defendant and the government provided that the government retained the discretion whether to file a motion for downward departure for substantial assistance pursuant to §5K1.1. The government chose not to file a motion for downward departure and the defendant was sentenced to a term of 24 months' imprisonment. The defendant argued on appeal that the Sentencing Commission exceeded its authority when it promulgated §5K1.1 as a "policy statement" because Congress mandated the creation of a "guideline" in 28 U.S.C. § 994(n). In relevant part, 28 U.S.C. § 994(n) provides that "[t]he Commission shall assure that the Guidelines reflect the general appropriateness of imposing a lower sentence than would be otherwise imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." The circuit court noted that Congress's instructions to the Sentencing Commission fall into four general categories: issue guidelines, issue policy statements, issue guidelines or policy statements or implement a certain congressionally determined policy in the guidelines as a whole. The circuit court recognized that the specific language of each subsection of § 994 determines into which of the four categories the instruction falls. After comparing the language in the subsections dealing with "guidelines" and "policy statements," the circuit court ruled that Congress was not mandating the promulgation of a specific guideline for downward departure based on substantial assistance in § 994(n). Rather, Congress was instructing that guidelines as a whole should "reflect" the appropriateness of a downward departure based on substantial assistance. The circuit court went on to address §5K1.1 and its relationship to 18 U.S.C. § 3553(e), and noted its previous ruling in United States v. Beckett, 996 F.2d 70 (5th Cir. 1993) where the dispositive issue was "whether § 3553(e) and §5K1.1 provide separate and distinct methods of departure or whether they are intended to perform the same function." *Id*. at 72. The Fifth Circuit concluded that "[b]ased on a combined reading of §5K1.1, § 3553(e) and § 994(n)], . . . there is a direct statutory relationship between §5K1.1 and § 3553(e) of such character to make §5K1.1 the appropriate vehicle by which

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[4] There is a circuit split on the issue of the appropriate standard of review of a prosecutor's refusal to file a substantial assistance motion. Some circuits hold that relief is warranted *only* when the refusal is based on an unconstitutional motive, and others hold that relief is *also* warranted when the refusal is not rationally related to any legitimate government interest. *Compare* United States v. Solis, 169 F.3d 224, 226 (5th Cir. 1998) (relief is only granted when refusal is based on unconstitutional motive), United States V. Bagnoli, 7 F.3d 90, 92 (6th Cir. 1993) (same), *and* United States v. Nealy, 232 F.3d 825, 831 (11th Cir. 2000) (same), *with* United States v. Sandoval, 204 F.3d 283, 286 (1st Cir. 2000) (relief is granted when the refusal is based on "an unconstitutional motive or the lack of a rational relationship to any legitimate governmental objective."), United States v. Brechner, 99 F.3d 96, 99 (2d Cir. 1996) (relief is granted when the refusal is based on "some unconstitutional reason"), United States v. Abuhouran, 161 F.3d 206, 211-12 (3d Cir. 1998) (relief is granted when the refusal is based on an "unconstitutional motive" or "was not rationally related to any legitimate government end"), United States v. LeRose, 219 F.3d 335, 342 (4th Cir. 2000) (same), United States v. Egan, 996 F.2d 328, 332 (7th Cir. 1992) (same), United States v. Cruz Guerrero, 194 F.3d 1029, 1031 (9th Cir. 1999) (same), United States v. Duncan, 242 F.3d 940, 947 (10th Cir. 2001) (same), and *In re Sealed Case* No. 97-3112, 181 F.3d 128, 142 (D.C. Cir. 1999) (same).

§ 3553(e) may be implemented." *Id*. The circuit court noted that because it had held §5K1.1 to be an appropriate vehicle to implement a statute, by definition, the Sentencing Commission did not exceed the authority given to it by Congress when it enacted §5K1.1.

United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994). The district court did not err in sentencing the defendant based on ex parte information. The defendant argued that the government's decision to submit ex parte letters upon which the departure committee based it decision not to file a §5K1.1 motion deprived him of the opportunity to challenge factual inaccuracies. The Fifth Circuit concluded that the defendant waived any right to see the letters because he "failed to petition the district court for access to the letters prior to sentencing." *Id*. at 1297. However, the district court erred in failing to make a factual determination of whether the defendant substantially assisted the government. The defendant argued that a letter submitted by a Justice Department trial attorney from another district indicated that he substantially assisted the government in the investigation and prosecution of others. He further averred that he was prepared to provide additional assistance but that the government indicated it no longer needed his help. The district court considered the record and found that it was silent as to what quantity and quality of cooperation the parties intended at the time the agreement was entered. Accordingly, the district court was ordered on remand to determine the reasonable expectations of the parties at the time the plea was negotiated.

§5K2.0 Grounds for Departure (Policy Statement)

Alienage

United States v. Garay, 235 F.3d 230 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1633 (2001). The appellate court upheld the district court's refusal to depart downward on the basis of defendant's alienage. The district court stated that there was nothing "atypical" about defendant's case that would take it outside the "heartland" of immigration cases to which the guideline applied. The cases upon which defendant relied were noted by the court of appeals as cases which involved aliens convicted of crimes other than immigration cases. The court determined that defendant's status as a deportable alien, as an inherent element of his crime, has already been considered by the Commission in formulating the applicable guideline.

History of Child Abuse

United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000). The appellate court reversed a downward departure based on defendant's history of not abusing any child, of not having an inclination, predisposition, or tendency to do so, and the fact that the defendant had not produced or distributed child pornography, with no inclination, predisposition, or tendency to do so. The court ruled that this factor did not suffice to take the defendant's case out of the "heartland" of §2G2.4. Consistent with the Second, Eighth, and Ninth Circuits, the court stated that the guidelines had taken into account the varying degrees of the severity of offenses involving possession of child pornography as compared to more serious forms of exploitation. The court held that the guidelines clearly reflect in §§2G.2.1-2G2.4 consideration of whether, and the degree to which, harm to minors is or has been involved.

United States v. Fonts, 95 F.3d 372 (5th Cir. 1996). The district court did not err in refusing to depart based on the disparity between crack cocaine and powder cocaine. The

defendant pled guilty to delivery of crack cocaine and was sentenced to 57 months. The defendant appealed, arguing that the district court erred in refusing to make a downward departure based on the different treatment relating to crack cocaine and powder cocaine offenses and the disparate impact the sentencing guidelines have on minorities. §5K2.0. he Fifth Circuit, joining with the First, Fourth, Seventh, Eighth, and District of Columbia Circuits, held that a district court can not depart based on the disparity between crack cocaine and powder cocaine. *See* United States v. Sanchez, 81 F.3d 9 (1st Cir.), *cert. denied*, 519 U.S. 877 (1996); United States v. Ambers, 85 F.3d 173 (4th Cir. 1996); United States v. Booker, 73 F.3d 706 (7th Cir. 1996); United States v. Higgs, 72 F.3d 69 (8th Cir. 1996); United States v. Anderson, 82 F.3d 436 (D.C. Cir. 1996). The circuit court noted that granting a downward departure based on the disparity between the penalties for crack cocaine and powder cocaine offenses would be second-guessing Congress's authority. The court stated: "it is not the province of this Court to second guess Congress's chosen penalty. That is a discretionary legislative judgment for Congress and the Sentencing Commission to make." 95 F.3d at 374 (*quoting* United States v. Cherry, 50 F.3d 338 (5th Cir. 1996)). The circuit court added: "[t]his court, as well as others, has declined to question the penalties for crack cocaine chosen by Congress, and we refuse to do so in this instance." Thus, the court concluded that the defendant's disparate impact argument must fail. *Id*. at 374.

United States v. Gonzales-Balderas, 11 F.3d 1218 (5th Cir.), *cert. denied*, 511 U.S. 1129 (1994). The district court did not err in refusing to depart downward from life imprisonment. The court concluded that the life sentence was a necessary deterrent given the vast profits the defendant was likely to gain in his role as middle manager in the conspiracy.

United States v. Hemmingson, 157 F.3d 347 (5th Cir. 1998). The Fifth Circuit held that the district court did not abuse its discretion when it determined that the defendant's offenses did not fall within the heartland of the money laundering guideline, and instead departed downward by applying the fraud guideline which resulted in lower sentencing range. Defendants in a campaign contribution case were convicted of interstate transportation of stolen property, money laundering, and engaging in a monetary transaction with criminally derived property, and one of them was also convicted of making false statements to a federal agent. The district court determined that the money laundering guideline primarily targets large-scale money laundering, which often involves the proceeds of drug trafficking or other types of organized crime, while present case involved the use of a conduit to conceal the fact that corporate funds were infused into a political campaign. The district court relied in part on the DOJ manual in determining whether the case represented a typical money laundering offense.

United States v. McDowell, 109 F.3d 214 (5th Cir. 1997). The district court did not err in departing upward based on the high probability of recidivism and the belief that the defendant would be unable to repay the money he embezzled. The defendant, an employee of a corporation, embezzled over $290,000. The calculated guidelines range was 18-24 months. Upon the third sentencing hearing, the court departed upward, to 39 months, based on two reasons: the high probability of recidivism based on prior extortionist conduct only two months before working for the corporation at issue, and the court's belief that the sentence was too lenient in light of the amount embezzled. With respect to the first basis for departure, the circuit court noted that prior uncharged conduct is addressed by §4A1.3. The district court found, however, that because of the prior conduct's proximity to the charged offense and its similarity to the conduct underlying the charged offense, the conduct was outside of the "heartland" of cases considered in §4A1.3 and

appropriately fell under §5K2.0. Based on Koon v. United States, 116 S. Ct. 2035, 2044 (1996), the circuit court found no clear error in such a departure. With respect to the second basis for departure, the district court reasoned that a sentence in the guidelines range of 18-24 months amounted to the defendant "earning" $145,000 per year. The court questioned the adequacy of such a punishment in light of the defendant's benefit, use and enjoyment of the embezzled money and, therefore, departed upward. Based on the intent of §5K2.0 to allow departures only for a character or circumstance placing the case outside of the "heartland" of cases considered by the Sentencing Commission, the circuit court held that this reasoning could not be upheld. Specifically, the court referred to the commentary of §5K2.0 which states: "[f]or example, dissatisfaction with the available sentencing range or preference for a different sentence that authorized by the guidelines is not an appropriate basis for a departure." The circuit court held that despite this error, remand was not necessary as it found that the sentence imposed by the district court would not have changed absent the improper basis for departure.

United States v. Threadgill**,** 172 F.3d 357, *cert. denied*, 120 S. Ct. 172 (1999). The appellate court affirmed the downward departure (reducing sentences from between 40 percent to 75 percent of presumptive range) based on fact that defendants' money laundering activities "were incidental to the gambling operation" (laundered only $500,000 of $20,000,000 in gross wagers) and that "defendants' conduct was atypical because the defendants never used the laundered money to further other criminal activities." *Id*. at 376. In the process, the Fifth Circuit expressly abrogated United States v. Willey, 57 F.3d 1374 (5th Cir.), *cert. denied*, 516 U.S. 1029 (1995) (departure cannot be justified on finding that the subject crime was a "disproportionately small part of the overall criminal conduct") in light of Koon.

United States v. Walters, 87 F.3d 663 *(*5th Cir.*), cert. denied*, 519 U.S. 1000 (1996). The court upheld the departure where the defendant did not personally profit from the money laundering scheme.

United States v. Wilder, 15 F.3d 1292 (5th Cir. 1994). The district court did not err in departing upward from the fine range. The applicable statute provides that when a defendant derives pecuniary gain from the offense or if the crime causes pecuniary loss to a person other than the defendant, the sentencing court has the authority to impose a fine which is the greater of twice the gross gain or twice the gross loss. 18 U.S.C. § 3571(d). The defendant's challenge to the propriety of the upward departure presented a question of first impression in the Fifth Circuit. The court of appeals considered the statute governing appellate review and concluded that there was "no distinction between reviews of departures from fine or imprisonment ranges." *Id*. at 1300. Accordingly, because the lower court did not clearly err in finding that the increased fine was necessary to ensure the defendant did not receive financial gain and that the defendant's criminal activity caused pecuniary loss to other persons, the upward departure was not an abuse of discretion.

United States v. Winters, 105 F.3d 200 (5th Cir. 1997), *cert. denied*, 528 U.S. 569 (1999). The sentencing court abused its discretion in calculating the defendant's sentence when it departed downward from the guidelines and classified the defendant's course of criminal conduct as a single aberrant act. The sentencing court also referred to the defendant's steady employment record as a correctional guard at Parchman and the institutional culture within the prison system as reasons to depart from the sentencing guidelines. The appellate court held that the departure was not

warranted based on the standard definition of aberrant behavior. The court reasoned that such aberrant behavior requires more than an act which is merely a first offense or "out of character" for the defendant. The court found that the defendant's behavior was not an act of spontaneous and thoughtless conduct because he committed multiple infractions, one in assaulting a prisoner and a second in attempting to coerce a witness into altering his testimony. In addition, the court was reluctant to convert the defendant's conduct into a single act of aberrant behavior when viewed in context of his history of lawful behavior and family support system because the sentencing court reasoning failed to cite the compelling facts necessary to satisfy the very high standard for this type of departure.

United States v. Winters, 174 F.3d 478 (5th Cir.), *cert. denied*, 120 S. Ct. 409 (1999). A state corrections officer convicted of several offenses growing out of his pistol-whipping of a handcuffed prisoner faced a mandatory 60-month term for the firearm offense, in addition to 108 to 135 months on his civil rights and obstruction of justice convictions. The district court's original basis for departure, "aberrant behavior," was rejected by the Fifth Circuit. The district court then departed downward, imposing 12-month terms concurrent with each other on the civil rights and obstruction charges and consecutive to the 60-month term for the firearm offense, on both grounds that his status as an officer made him especially susceptible to abuse in prison and on the grounds that the guidelines sentence, which included a mandatory minimum term for the use of a firearm, was too harsh. Once again, the Fifth Circuit reversed the downward departures. First, the idea that a mandatory minimum sentence can make a defendant's other convictions too harsh has already been rejected by the Fifth Circuit in United States v. Caldwell, 985 F.2d 763 (5th Cir. 1993). That case made clear that the Sentencing Commission had thoroughly considered the interplay of 18 U.S.C. § 924(c)'s sentence provision on the underlying crimes. Since the facts cited by the district court did not serve to take this defendant's case out of the "heartland" of cases covered by the applicable guidelines, no downward departure was warranted. Additionally, no departure was warranted for the defendant's susceptibility to abuse in prison based on his status as a correctional officer. There was no evidence in this case that the defendant was the subject of widespread publicity like the defendants in the Koon case. Nor did any other factor exist that made him more susceptible to abuse in prison than any other convicted corrections officer. Accordingly, because the district court articulated no adequate departure factors and was based only on the district court's preference, the case was remanded for re-sentencing without the benefit of the departures.

§5K2.1 Death

United States v. Davis, 30 F.3d 613 (5th Cir. 1994), *cert. denied*, 513 U.S. 1098 (1995). The district court did not err in departing upward pursuant to §5K2.1. An employee of one of the gas stations the defendant robbed suffered an aneurysm at the base of her brain as a result of the trauma of robbery. The defendant argued that although the employee subsequently died, none of the §5K2.1 factors applied to his case. The circuit court concluded that a §5K2.1 upward departure still may be warranted absent a finding that all the factors exist since "[t]he only mandatory `language in the section is that the judge must' consider matters that, normally distinguish among levels of homicide, such as state of mind." *Id*. at 615-616 (*quoting* United States v. Ihegworo, 959 F.2d 26, 29 (5th Cir. 1992)). The district court specifically considered the mandatory factors when it concluded that although the defendant did not intend to kill the employee, he should have anticipated that his conduct could result in serious injury or death. The circuit court additionally

rejected the defendant's argument that the consecutive sentences he received on the firearms counts adequately accounted for the employee's death.

United States v. Singleton, 49 F.3d 129 (5th Cir.), *cert. denied*, 516 U.S. 924 (1995). The appellate court affirmed the district court's upward departure to a sentence of life imprisonment for a defendant who participated in the killing of the victim of a robbery and carjacking conspiracy. In conducting review for plain error, the appellate court noted that the four-level enhancement for permanent or life threatening injury awarded under §2B3.1(b)(3)(C) did not preclude an upward departure for the death of the victim. *See* United States v. Billingsley, 978 F.2d 861, 865-66 (5th Cir. 1992), *cert. denied,* 507 U.S. 1010 (1993).

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors (Policy Statement)

United States v. Williams, 22 F.3d 580 (5th Cir.), *cert. denied*, 513 U.S. 951 (1994). The district court committed harmless error when it considered the defendant's indictment as evidence at the sentencing hearing. The circuit court concluded that because the indictment is merely a charging instrument that does not constitute evidence of guilt, it may not be considered at sentencing. However, the lower court's use of the indictment in its sentencing calculation was harmless because the record contained other reliable data upon which the district court could base its sentencing determination.

Part B Plea Agreements

§6B1.2 Standards for Acceptance of Plea Agreements (Policy Statement)

United States v. Foy, 28 F.3d 464 (5th Cir.), *cert. denied*, 513 U.S. 1031 (1994). The district court did not err by failing to expressly state its reasons for rejecting the defendant's plea agreement. The circuit court declined to adopt the rulings of its sister circuits that impose such a requirement. *See* United States v. Moore, 916 F.2d 1131 (6th Cir. 1990); United States v. Miller, 722 F.2d 562 (9th Cir. 1983); United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973); *but see* United States v. Moore, 637 F.2d 1194, 1196 (8th Cir. 1981). However, where it is not clear that the court did not consider an improper basis in rejecting the agreement, the sentence must be vacated and remanded. Here, the appellate court remanded because it could not determine from the record whether the district court erroneously rejected the plea because defendant would not acquiesce to certain findings of the presentence report.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Mathena, 23 F.3d 87 (5th Cir. 1994). The district court did not err in sentencing the defendant upon revocation of supervised release to a term of imprisonment in excess of the term recommended in the Chapter Seven policy statement. The Fifth Circuit, citing United States v. Headrick, 963 F.2d 777 (5th Cir. 1992), upheld the sentence because there are no applicable guidelines for sentencing after revocation of supervised release, and the sentence was not otherwise unlawful or plainly unreasonable. Policy statements contained in the probation and supervised release guidelines are advisory only, and therefore not binding on the district court.

United States v. Stiefel, 207 F.3d 256 (5th Cir. 2000). The defendant was serving two concurrent two-year terms of supervised release, which followed two concurrent terms of 57 months' imprisonment for bank robbery. The district court revoked the terms of supervised release in part because the defendant failed a drug test and sentenced the defendant to ten months imprisonment and 14 months of supervised release. While serving the second term of supervised release, the defendant alleged that the revocation sentence was illegal because the court lacked authority to impose a term of supervised release to follow the prison sentence. The district court rejected the defendant's argument, and the defendant did not appeal. The defendant violated the second term of supervised release and the district court imposed two concurrent terms of fourteen months of imprisonment. The defendant argued that the sentence for the second revocation was illegal because the original revocation sentence was illegal. The Fifth Circuit held that the defendant's claim was barred because he had already litigated the issue. The defendant also argued that the court had no authority under 18 U.S.C. § 3583(e) and (h) to incarcerate the defendant for the second violation because those provisions do not specifically authorize second revocations. The Fifth Circuit held that the provisions permit successive revocations. "[T]he issue under § 3583(e) is not whether a second revocation may occur, but whether the district court, after considering certain factors, believes that revocation is appropriate . . . ." *Id*. at 260.

§7B1.4 Term of Imprisonment (Policy Statement)

United States v. Giddings, 37 F.3d 1091 (5th Cir. 1994), *cert. denied*, 514 U.S. 1008 (1995). The defendant appealed his sentence upon the mandatory revocation of his supervised release. He asserted that his sentence to 24 months' imprisonment constituted an upward departure, and that the district court erred in considering his need for drug rehabilitation in deciding the length of imprisonment to impose. In addressing an issue of first impression, the appellate court determined that where the revocation is mandatory under the provisions of 18 U.S.C. § 3583(g), the district court "may consider a defendant's rehabilitative needs in determining the length of a sentence of imprisonment upon revocation of supervised release."

See United States v. Mathena, 23 F.3d 87 (5th Cir. 1994), §7B1.3.

APPLICABLE GUIDELINES/EX POST FACTO

United States v. Thomas, 12 F.3d 1350 (5th Cir.), *cert. denied*, 511 U.S. 1095 (1994). The district court did not err in sentencing the defendants under the amendments to the sentencing guidelines which increased the penalties effective November 1, 1989. The defendants argued that application of the amendments violated the Ex Post Facto Clause because of the lack of evidence

demonstrating their participation in the conspiracy after November 1, 1989. The circuit court held that conspirators who fail to affirmatively withdraw from the conspiracy will be sentenced under the amendments even if they did not personally commit an act in furtherance of the conspiracy after the amendment's effective date, if it was foreseeable that the conspiracy would continue past that date.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Singleton, 16 F.3d 1419 (5th Cir. 1994), *cert. denied*, 516 U.S. 924 (1995). On the government's appeal, the circuit court reversed the district court's dismissal on double jeopardy grounds of a firearms charge brought against defendants who were also charged with armed "carjacking," and remanded the cases for reinstatement of the firearms count. The question is one of first impression in the circuits. The district courts have split on the issue. The circuit court determined that "proof of a violation of [carjacking, 18 U.S.C. §] § 2119 always proves a violation of [18 U.S.C.] § 924(c), and the two statutes fail the Blockburger `same elements' test." *Id*. at 1425. However, "Congress intended for §924(c)'s five-year sentence to be imposed cumulatively with the punishment for the predicate drug-related or violent crime. Accordingly, § 924(c) clearly indicates Congress's intent to punish cumulatively violations of sections 924(c) and 2119. That clear indication of Congress's intent saves the statutes from the double jeopardy bar even though they fail the Blockburger test." *Id*.

United States v. Wittie, 25 F.3d 250 (5th Cir. 1994), *aff'd*, 515 U.S. 389 (1995). In addressing an issue of first impression, the circuit court reversed the district court's dismissal of an indictment on double jeopardy grounds because the instant offense had been included as relevant conduct in an earlier proceeding. The circuit court concluded that sentencing for a subsequent cocaine conspiracy would not be unconstitutional because Congress intended that a defendant may be prosecuted in more than one federal proceeding for different criminal offenses that were part of the same course of conduct. Section 5G1.3(b) "clearly provides that the government may convict a defendant of one offense and punish him for all relevant conduct; then indict and convict him for a different offense that was part of the same court of conduct as the first offense—and sentence him again for all relevant conduct." *Id*. at 260. Section 5G1.3 provides for imposition of a concurrent sentence, and credit for time served, so that the additional punishment is appropriately incremental. In reaching this conclusion, the circuit court distinguished the Tenth Circuit's decision in United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), *cert. denied*, 503 U.S. 994, *and cert. denied*, 503 U.S. 998 (1992), because that court did not have the benefit of §5G1.3, and expressly rejected as incorrect the Second Circuit's approach in United States v. McCormick, 992 F.2d 437 (2d Cir. 1993).

Fifth Amendment—Due Process

United States v. Miro, 29 F.3d 194 (5th Cir. 1994). The district court did not violate the defendant's due process rights. The defendant was visiting Spain at the time the government obtained an indictment charging the defendant with mail fraud and money laundering. He was held in Spanish custody pending extradition. Although the extradition treaty limited prosecution to the

mail fraud counts because money laundering was not an offense under Spanish law, the defendant argued that the district court took into account this limitation and sentenced him more harshly. The circuit court disagreed. The doctrine of specialty requires that the defendant be prosecuted only for crimes for which he was extradited. Neither the PSR nor the sentencing judge relied on the money laundering counts for relevant conduct purposes. Although the district court did remark that the consecutive sentencing was imposed in part because of the defendant's fight against extradition, these statements were made in response to the defendant's request for a lenient sentence and were not made in violation of the doctrine of specialty or the defendant's due process rights.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 32

United States v. Myers, 150 F.3d 459 (5th Cir. 1998). The district court erred in failing to provide the defendant with an opportunity to make a statement or speak in mitigation of his sentence, in derogation of the right of allocution in Rule 32. Neither the arguments of defendant's counsel nor the district court's two questions to the defendant regarding the firearms enhancement were sufficient to meet the plain requirements of Rule 32. The court of appeals went on to hold that denial of a defendant's Rule 32 right of allocution is an error requiring automatic reversal, not one which could be deemed harmless.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 922

United States v. Wright, 24 F.3d 732 (5th Cir. 1994). The district court clearly erred in its factual finding that the defendant constructively possessed a weapon for purposes of 18 U.S.C. § 922(g)(1). The district court based its conclusion on the defendant's operation of the automobile, on his attempts to elude the police, and on his furtive movements near the glove compartment. The circuit court acknowledged that mere dominion over a vehicle in which a firearm has been found has been sufficient to find constructive possession. *See, e.g.*, United States v. Prudhome, 13 F.3d 147 (5th Cir.), *cert. denied*, 511 U.S. 1097 (1994); United States v. Knezek, 964 F.2d 394 (5th Cir. 1992). However, in this case, the court was faced with strong countervailing evidence: (1) the passenger owned the car, (2) the key which unlocked the glove compartment in which the gun was recovered was found in the back seat of the police cruiser where the passenger had been detained by himself, and (3) the passenger was charged with possession of the firearm.

18 U.S.C. § 924(c)

United States v. Schmalzreid, 152 F.3d 354 (5th Cir. 1998). The district court erred in denying defendant's motion to vacate his conviction, based on a guilty plea, under 18 U.S.C. § 924(c). When the defendant was arrested cooking methamphetamine in the kitchen, agents found a .25 caliber pistol in his wife purse in the unoccupied living room. The district court concluded that the conviction could not stand on the "use" prong of § 924(c) following the decision in Bailey v. United States, 516 U.S. 137 (1995), but upheld the conviction under the "carry" prong. The

court of appeals noted that, in the nonvehicular context, the Fifth Circuit has required that the weapon be moved or transported in some manner, or borne on one's person, during and in relation to the commission of the offense. The court held that, although the defendant "carried" the gun when he moved it to his wife's purse, the government failed to show that by its carriage to the purse, the firearm had a "purpose or effect" with respect to the drug offense so as to satisfy the "during and in relation to" part of the statute. The court vacated and remanded the case for entry of a new plea.

18 U.S.C. § 3581

United States v. Jeanes, 150 F.3d 483 (5th Cir. 1998). The district court did not err in denying the defendant's motion to modify or terminate his supervised release term. The defendant moved for the reduction or termination based on time already served in prison on a subsequently vacated § 924(c) conviction. The court of appeals held, first, that the district court had not abused its broad discretion to terminate supervised release under 18 U.S.C. § 3581(e)(1) because it considered the factors listed by the statute in denying the requested relief. The court of appeals also rejected defendant's argument that his time served and good-time credits on the vacated conviction be applied to reduce the term of supervised release. The court noted that imprisonment and supervised release serve very different purposes, that incarceration does nothing to assist a defendant's transition back into society and is, therefore, not a reasonable substitute for a portion of the supervised release term. The court held, however, that a district court may take time served into consideration as one factor among many under the directive of § 3583(e)(1).

21 U.S.C. § 841

United States v. Hass, 150 F.3d 443 (5th Cir. 1998), *cert. denied*, 121 S. Ct. 34 (2000). The district court erred in applying the enhancement for conviction of a drug felony after two or more convictions for a felony drug offense have become final. The court of appeals stated that, for § 841(b)(1) enhancement purposes, a conviction does not become final until the time for seeking direct appellate review has elapsed. In this instance, the defendant was sentenced for the prior offenses on August 26, 1996. Under Texas law, the time for direct appellate review did not expire until September 26, 1996; thus, the convictions did not become final for enhancement purposes until that time. Because the drug conspiracy ended September 11, 1996, the defendant committed the conspiracy offense before his prior convictions became final.

United States v. Valencia-Gonzales, 172 F.3d 344 (5th Cir.), *cert. denied*, 120 S. Ct. 222 (1999). A federal defendant's sentence for drug importation is properly keyed to the identity of the drug the defendant was actually carrying rather than the drug he thought he was carrying. Although the statutory scheme requires specific intent to carry a controlled substance, it imposes a strict liability punishment based on which controlled substance, and how much of it, is involved in the offense. The Court relied on United States v. Strange, 102 F.3d 356, 361 (8th Cir. 1986), for the proposition that Congress had a rational basis to conclude that there is some deterrent value in exposing a drug trafficker to liability for the full consequences, both expected and unexpected, of his own unlawful behavior in sentencing the defendant. Accordingly, the district court did not err in sentencing the defendant according to the drug he was carrying, heroin, rather than the drug he believed he was carrying, cocaine.

POST-APPRENDI

United States v. DeLeon, 247 F.3d 593 (5th Cir. 2001). The defendant was convicted of conspiracy to possess with intent to distribute more than 100 kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846, and aiding and abetting the possession of marijuana with intent to distribute. The indictment alleged a drug quantity greater than 100 kilograms of marijuana and the jury was not instructed that it had to find a particular quantity of marijuana beyond a reasonable doubt. The defendant was sentenced to 78 months. On appeal, the defendant argued that his sentence was in violation of Apprendi because the indictment did not allege a specific drug quantity and such lack of specificity should subject him only to the lowest statutory sentencing range of § 841(b)(1)(D) (five-year statutory maximum). The court held that an indictment's allegation of a drug-quantity range, as opposed to a precise drug quantity, is sufficient to satisfy Apprendi and its progeny. *See also* United States v. Slaughter, 238 F.3d 580, 583 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2015 (2001) (holding that drug quantities not expressed in the jury instructions as an element was harmless error and would not lead to a contrary finding as to the drug quantities alleged in the indictment).

United States v. Fort, 248 F.3d 475 (5th Cir. 2001). The district court did not err in imposing a 21-month sentence because it was within the prescribed five-year statutory maximum for the offense. The defendant pled guilty to possession with intent to distribute approximately 561.2 pounds of marijuana, in violation of 21 U.S.C. § 841(a)(1) and was sentenced to 21 months. On appeal the defendant challenged his sentence and argued that: 1) section 841 was unconstitutional under Apprendi because Congress intended the facts that determine the maximum sentence to be sentence enhancements rather than elements; and, 2) his 21-month sentence exceeded the one-year maximum under 21 U.S.C. § 841(b)(4). The court rejected both arguments. The court stated that the issue of the constitutionality of the drug statutes was recently rejected in an earlier Fifth Circuit decision in United States v. Slaughter.[5] The court further stated that the one-year maximum sentence applied only to distribution of a "small amount of marijuana for no remuneration" under 21 U.S.C. §§ 841(b)(4). Because the defendant was charged with, and stipulated to, 561.2 pounds of marijuana, the one-year maximum under § 841(b)(4) did not apply but the five-year maximum under § 841(b)(1)(D) did apply. Under § 841(b)(1)(D), the court held Apprendi did not invalidate the defendant's sentence.

United States v. Green, 246 F.3d 433 (5th Cir. 2001). The district court's error in failing to instruct the jury to find a specific amount of drugs beyond a reasonable doubt was harmless. The defendant was convicted of harboring a fugitive and of a drug trafficking conspiracy involving a fugitive. The defendant was ultimately sentenced to 25 years of imprisonment for the conspiracy conviction and five years for harboring a fugitive, with the two sentences running concurrently. On appeal, the defendant argued that the specific amount of drugs involved in the conspiracy was not submitted to the jury for its determination beyond a reasonable doubt and that the jury was not specifically instructed that drug quantity was an element of the conspiracy offense for which it was required to make a specific finding. The court found it sufficient that the district court explicitly

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[5] 238 F.3d 580, 582 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2015 (2001) (held that Apprendi did not render federal drug and conspiracy statutes unconstitutional on their face).

instructed, as part of the first conspiracy element, that the jury must find that the defendant agreed to commit the crime of distribution of the named drugs "as charged in the indictment." The defendant's sentence was affirmed.

United States v. Thomas, 246 F.3d 438 (5th Cir. 2001). The district court erred by imposing a sentence beyond the prescribed statutory maximum based upon a drug quantity amount not proven beyond a reasonable doubt. The defendant was one of four defendants convicted of a crack cocaine distribution conspiracy in violation of 21 U.S.C. § 841(b)(1)(C), and sentenced to life imprisonment based on the amount of crack cocaine found by the district court using the preponderance of the evidence standard. On appeal the defendant argued that her sentence was unconstitutional under Apprendi because the amount of crack cocaine determined by a preponderance of the evidence increased the penalty for her crime beyond the prescribed statutory maximum of 20 years. The court agreed with the defendant and held that the defendant's sentence was unconstitutional under Apprendi because the drug quantity factor increased the penalty beyond the statutory maximum and as such became an element of the offense to be proven beyond a reasonable doubt.

United States v. Vasquez-Zamora, No. 99-51182, 2001 WL 585127 (5th Cir. May 31, 2001). The district court erred in sentencing the defendant, in violation of Apprendi, to a sentence that exceeded the five-year statutory maximum for the offense of conviction and to a supervised release term based on an enhanced penalty that exceeded the three-year statutory maximum for the applicable term of supervised release. Both increases were based on drug quantities not alleged in the indictment and submitted to the jury. The defendant was convicted of possession with intent to distribute marijuana, and conspiracy to possess with intent to distribute marijuana and was sentenced to 65 months on each count to be served concurrently, exceeding the maximum by five months, followed by a five-year term of supervised release, which exceeded the three-year maximum by 24 months. On appeal the court vacated and remanded defendant's sentence and term of supervised release as a violation of Apprendi because the drug quantities had not been alleged in the indictment and proven beyond a reasonable doubt.

United States v. Wilson, 249 F.3d 366 (5th Cir. 2001). The district court did not err by not requiring the jury to find the monetary amount involved beyond a reasonable doubt. The defendant was convicted of conspiracy to commit money laundering, money laundering, mail fraud, and engaging in monetary transactions involving property derived from a specified unlawful activity. A ten-level enhancement was applied to the defendant's offense level of 23 on the money laundering charge based on the monetary amount of the scheme. The defendant was sentenced to 240 months in part because of the monetary amount involved. On appeal, the defendant argued that Apprendi required the jury to find the monetary amount beyond a reasonable doubt. The court held that because the defendant's statutory maximum of 240 months did not exceed the defendant's sentence of 240 months, there was no Apprendi violation. *See also* United States v. Nguyen, 2001 WL 366339, at *3 (1st Cir. April 17, 2001) (enhancement under §2B3.1(b)(2)(C) for possession of a firearm during commission of a robbery did not result in a sentence that exceeded the defendant's statutory maximum).